IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-871

JOHN R. MANSON, Commissioner of Correction of the State of Connecticut, *Petitioner*,

v.

NOWELL A. BRATHWAITE, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GEORGE D. STOUGHTON
State's Attorney
95 Washington Street
Hartford, Connecticut 06106

BERNARD D. GAFFNEY
Assistant State's Attorney
95 Washington Street
Hartford, Connecticut 06106

Attorneys for Petitioner

INDEX

APPENDIX

CITATIONS

Statutes and Rules:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. _____

JOHN R. MANSON, Commissioner of Correction of the State of Connecticut, *Petitioner*,

v.

NOWELL A. BRATHWAITE, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, John R. Manson, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on November 20, 1975. The decision reversed the judgment of the United States District Court for the District of Connecticut which by decision, dated May 13, 1975, dismissed the Respondent's petition for a writ of habeas corpus.

OPINIONS BELOW

The Connecticut Supreme Court on April 5, 1973, affirmed the Respondent's conviction after a trial to a jury of twelve. The opinion of the Court (Appendix, pp. 1a to 4a) is reported at 164 Conn. 617, 325 A.2d 284. The District Court's opinion dismissing the Respondent's petition (Appendix, pp. 5a to 11a) is not officially reported on this date. The opinion of the Court of Appeals reversing the judgment of the District Court (Appendix, pp. 12a-29a) is not officially reported on this date.

JURISDICTION

The judgment of the Court of Appeals was entered on November 20, 1975. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED

1. The first question presented is whether evidence received at trial of an impermissibly suggestive photographic identification by a witness for the prosecution renders the Respondent's conviction violative of due process, notwithstanding the receipt of other evidence during the trial serving as a valid basis for an in-court identification by the same witness. In other words, has the Court of Appeals erred in its interpretation of this Court's decision in *Neil* v. *Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); namely, that the factors to be considered in evaluating the likelihood of misidentification therein recited (pp. 199-200) apply only to cases which arose before this Court's decision in *Stovall* v. *Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) and the principle enunciated therein (pp. 301-302).

2. The second question presented is whether the Court of Appeals erred in substituting its judgment of the facts for that of the trier (Appendix, pp. 26a, 27a) in reaching its conclusion that for other reasons the conviction should not stand.

STATEMENT OF THE CASE

On May 5, 1970, at about 7:45 P.M., Jimmy D. Glover, a black undercover State Police Officer, and an informant went to a third floor apartment at No. 201 Westland Street, Hartford, to purchase narcotics from a suspected seller. After he knocked the door opened twelve to eighteen inches and Glover observed a black male standing in front of a female inside the apartment. It was not dark, there was natural light coming from the outside

through the windows into the hallway, and Glover had no difficulty seeing. After the informant identified himself, Glover asked the male for some narcotics. This person asked Glover to repeat his request and when he did, the person held out his hand and Glover handed him two $10 bills. Two or three minutes elapsed before the door closed. After a few moments the door reopened and the same male person placed two glassine bags from his left hand into Glover's hand before the door closed again. From the time it opened until the door closed a second time five to seven minutes elapsed. During the entire period the door was open there was light coming from within the apartment and Glover stood within two feet of the person from whom he made the purchase while looking at his face. During the time of the sale Detective Michael D'Onofrio of the Hartford Police Department was stationed outside the building acting as a covering officer for Glover. Later the same evening Glover, who did not know his seller by name, described him to D'Onofrio as being a dark-complexioned black male, approximately five feet eleven inches tall, heavy build, black hair in an Afro style, with high cheek bones, wearing blue pants and a plaid shirt. D'Onofrio who recognized the description given as that of Nowell Brathwaite obtained a photograph of Brathwaite and he dropped the photograph off at State Police Headquarters. Two days after the sale while at headquarters Glover looked at the photograph and identified the person shown as the same person from whom he had purchased the narcotics.

Brathwaite was place under arrest in August 1970. His arrest took place at a third floor apartment at No. 201 Westland Street, Hartford, the same third floor apartment at which the sale had taken place. At the time Brathwaite was visiting a Mrs. Ramsey, who was a friend of his wife, and he admitted that he had visited this apartment "lots of times" prior to the date of the offense.

On January 8, 1971, during the trial of the case, the photograph from which Glover had identified Brathwaite was received in evidence without objection. Glover who had not seen Brathwaite since the date of the sale, testified unequivocally ("There is no question whatsoever") that the person shown in the photograph was the same person from whom he had made the purchase. Glover, also without objection, made a positive in-court identification of Brathwaite.

The Respondent was found guilty by a jury of both counts of a criminal information charging him with the illegal sale and possession of narcotics. He was on the date of his petition to the District Court in State custody pursuant to the sentence imposed by the State trial court. Federal jurisdiction of the District Court was based on the provisions of 28 U.S.C., Sec. 2254.

REASONS FOR GRANTING REVIEW ON CERTIORARI

Review by this Court of the decision below is called for because the decision of the Court of Appeals is in conflict with decisions on the same or similar issue by other Courts of Appeal, and for the further reason that the decision of the Court of Appeals is based on an interpretation of federal law which has not been, but should be, determined by this Court.

Review by this Court is further called for because the Court of Appeals in reversing the decision of the District Court and the verdict of the State trial court has weighed the evidi-dence, decided issues of credibility, and substituted its judgment for that of the trier.

I.

An examination of the cases on which the Court of Appeals relies in support of its conclusion that the decision of *Neil* v. *Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 was in-

tended to qualify the exclusionary rule of *Stovall* v. *Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) only as to pre-*Stovall* cases shows that only the Fourth Circuit *[Smith* v. *Coiner*, 473 F.2d 877, 882 (1973), cert. den. sub nom. *Wallace* v. *Smith*, 414 U.S. 1115 (1973)] in reversing the District Court's result is in strict accord. Even there a strong dissenting opinion (Murray, J.), in which the *Biggers* guidelines are applied to the facts of the case, concludes as follows (p. 889):

> "In the present case I think the Supreme Court would reach the same conclusion it reached in *Neil* v. *Biggers* namely: 'The evidence was properly allowed to go to the jury.'"

The Fifth Circuit case of *Rudd* v. *State of Florida*, 477 F.2d. 805 (1973) also cited by the Court of Appeals in support of its decision is less than conclusive. The subject offense having occurred December 7, 1968 (*Rudd* v. *State of Florida*, 343 F. Supp. 212, 215), the case is in the post-*Stovall* period. Neverthelesss the appeals court recites that, notwithstanding the State's error in offering constitutionally deficient identification evidence stemming from a tainted procedure, other evidence could have been offered (it was not) to show that the error was harmless:

> "In *Simmons* the Court held that the state commits constitutional error in eliciting in-court identifications by witnesses who have attended pretrial identification proceedings 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.' Id. at 384, 88 S.Ct. at 971, 19 L.Ed.2d at 1253. While the habeas court did, as we have noted, correctly determine that the showup was impermissibly suggestive, it did not specifically find that the showup was likely to induce irreparable misidentification, a finding indispensable to proper application of the *Simmons* test. See *Neil* v. *Biggers*,

409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401, 410-411 (1972); *United States* v. *Sutherland*, 428 F.2d 1152, 1155 (CA5 1970). On this cold record we cannot make the required factual determinations." Id. p. 809.

The *Rudd* court seems to be saying that the *Biggers* guidelines have a clear application to cases more recent than *Stovall*.

Workman v. *Cardwell*, 471 F.2d 909 (1972), cert. den. 412 U.S. 932 (1973) decided in the Sixth Circuit, is also out of the category of pre-*Stovall* cases (see *Workman* v. *Cardwell*, 338 F. Supp. 893, 894). Whether it lends support to the conclusion of the Appeals Court in the instant case is unclear. The decision, which turned on a single photo showup subsequent to the issuance of an arrest warrant when the same witness could make no identification from twenty photographs shown to him shortly after the robbery, does not cite *Biggers* or even refer to the existence or nonexistence of other evidence which might have strengthened the identification.

A more recent case from the same Sixth Circuit which concerned a 1970 offense is far more in point and reaches a result contrary to the Brathwaite court:

> "The record fully supports these findings, which constitute precisely the elements that refute a due process claim under the Supreme Court's decision in *Neil* v. *Biggers*, 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). Thus, although the showups may have been 'unnecessarily suggestive' and although the showups may have been poor substitutes for lineups or other more acceptable confrontations, *Biggers* requires rejection of Appellant's claim." (i.e. that his due process rights were violated by the admission of testimony concerning showups which were unnecessarily suggestive and conducive to irreparable misidentification). "The central question [is] whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive. 409 U.S. at 199."
>
> *Holland* v. *Perini*, 512 F.2d 99, 103-104 (1975).

That the Seventh Circuit (Stevens, J.), although recognizing the evils of a suggestive showup, also disagrees with the conclusion of the Court of Appeals is clear:

> "The Justices have plainly told us that the admission of evidence of a showup does not necessarily violate due process. Logically, that statement applies equally to showups which occurred after as well as before the *Stovall* decision. For nothing in the *Stovall* decision itself implied that any redefinition of due process standards occurred on June 12, 1967."
>
> *United States ex rel. Kirby* v. *Sturges*, 510 F.2d 397, 406-407 (1975), cert. den. —— U.S. ——, 44 L.Ed.2d 685, 95 S.Ct. 2424. See also *United States ex rel. Pierce* v. *Cannon*, 508 F.2d 197, 204 (1974); *Israel* v. *Odom*, 521 F.2d 1370, 1375-1376 (1975).

As Judge Stevens points out in *Kirby* (N. 32) "since *Stovall* did not purport to fashion any general exclusionary rule — as opposed to analysis of the circumstances of particular cases — it does not seem reasonable to interpret *Stovall* as marking the effective date of a brand new exclusionary rule." Id. p. 407.

Disagreement with the Brathwaite court's result may also be inferred from a reading of the First Circuit's opinion in *Nassar* v. *Vinzant*, 519 F.2d 798 (1975) where in evaluating the constitutional effect of in-court testimony regarding an out-of-court suggestive identification procedure the court said (p. 801):

> "We can agree that the arrival, at 7 a.m., of two police officers bearing a single photograph carries some sugges-

tive connotations. But we do not think those facts sufficient in themselves to support the conclusion that appellant's conviction must be vacated. Insofar as cases such as *United States* v. *Fowler*, 439 F.2d 133 (9th Cir. 1971), may be read to announce a per se rule condemning as constitutionally infirm all evidence derived from single photo identifications, see *Workman* v. *Cardwell*, 338 F.Supp. 893, 895-96 (N.D. Ohio 1972), *aff'd.*, 471 F.2d 909 (6th Cir. 1972), *cert. denied*, 412 U.S. 932, 93 S.Ct. 2748, 37 L.Ed.2d 161 (1973), we do not follow them. Single photo identifications do, indeed, present so serious a danger of suggestiveness as to require that they be given extremely careful scrutiny, but beyond stating this, we cannot provide a rule of thumb, as every suggestive identification case must be tested under the 'totality of the circumstances' standard of *Stovall* v. *Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). *Simmons*, *supra* 390 U.S. at 383, 88 S.Ct. 967; *Neil*, *supra* 409 U.S. at 196, 93 S.Ct. 375."

Clearly there are differences of opinion among the Circuits as to the critical issue in the instant case.

II.

The Court of Appeals has ruled (Appendix, p. 26a) that "even if we should be wrong in all this and *Neil* v. *Biggers* was intended to apply the *Simmons* test to post-*Stovall* show-ups or photographic displays that were impermissibly and unnecessarily suggestive, as well as to in-court identifications following upon them, the writ should issue here." The Court then proceeded to evaluate the facts (Appendix, pp. 26a, 27a) and to substitute its judgment for that of the trier in the State court and the reviewing judge in the federal district court. The original description of Brathwaite given by Officer Glover to Detective D'Onofrio, of which testimony was received at trial, was deemed by the Appeal's Court to be inadequate; the identification testimony, because it came from an undercover police officer and because Brathwaite was sitting at the counsel table during the trial, was discredited; and plausibility was assigned to the alibi evidence when the same was rejected by the trier.

The review of the Court of Appeals was the narrow and limited one of due process, and whether it was violated. *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). It was not the function of the Appeals Court, the due process question aside, to weigh and speculate about the significance of the facts and the credibility of the testimony, matters which were decided by the trier. *Rogers* v. *Richmond*, 365 U.S. 534, 545, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961). On the contrary, the Court should have examined the evidence in the view most favorable to the prosecution, and had it done so it would have sustained the conviction. *Hamling* v. *United States*, 418 U.S. 87, 124, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974).

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

GEORGE D. STOUGHTON
State's Attorney
95 Washington Street
Hartford, Connecticut 06106

BERNARD D. GAFFNEY
Assistant State's Attorney
95 Washington Street
Hartford, Connecticut 06106

Attorneys for Petitioner

CERTIFICATE OF SERVICE

We, George D. Stoughton and Bernard D. Gaffney, Attorneys for the Petitioner, certify that a copy of the foregoing Petition was mailed, via U.S. Mail, postage prepaid, this 17th day of December, 1975, to the following attorneys of record: David Golub, Esq., 733 Summer Street, Stamford, Connecticut 06905; Martha Stone, Esq., 1800 Asylum Avenue, West Hartford, Connecticut 06117.

GEORGE D. STOUGHTON
State's Attorney

BERNARD D. GAFFNEY
Assistant State's Attorney

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. _____

JOHN R. MANSON, Commissioner of Correction of the State of Connecticut, *Petitioner*,

v.

NOWELL A. BRATHWAITE, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

STATE OF CONNECTICUT v. NOWELL BRATHWAITE

HOUSE, C. J., SHAPIRO, LOISELLE, MACDONALD and BOGDANSKI, *Judges*.

Argued March 8 — decided April 5, 1973

Information in two counts charging the defendant with the crime of selling heroin and with possession of a quantity of a narcotic drug, brought to the Superior Court in Hartford County and tried to the jury before *Dannehy, J.*; verdict and judgment of guilty of both crimes, from which the defendant appealed. *No error.*

Noble K. Pierce, for the appellant (defendant).

Bernard D. Gaffney, assistant state's attorney, with whom, on the brief, was *John D. LaBelle*, state's attorney, for the appellee (state).

PER CURIAM. The defendant was charged with (1) sale of a narcotic drug and (2) possession of a narcotic drug. A jury found him guilty of both counts and the defendant has appealed, assigning as error the denial of his motion to set aside the verdict and two rulings on evidence.

The defendant's attack on the court's denial of his motion to set aside the verdict is considered by examining the evidence printed in the appendices to the briefs in order to determine whether the jury acted fairly, intelligently and reasonably in rendering its verdict. *State* v. *Mayell*, 163 Conn. 419, 421, 311 A.2d 60; *State* v. *Shelton*, 160 Conn. 360, 361, 278 A.2d 782.

From the evidence offered, the jury could reasonably have found the following facts. In May, 1970, Trooper Jimmy Glover of the Connecticut state police was assigned to the narcotics squad in an undercover capacity. On the evening of May 5, 1970, at about 7:45 p.m., he went with an informant to an apartment on the third floor of a building at 201 Westland Street, Hartford. There was natural light coming through the windows in the hallway and Glover had no difficulty seeing in the hallway. He knocked at the door of an apartment and when the door opened, he observed a male standing in front of a female. Trooper Glover asked the man for some narcotics. The door was closed and after a few moments the door was reopened and Glover purchased two glassine bags containing a white powder for $20 from the male. Although Glover did not know the seller at that time, he stood within two feet of the seller and was looking at his face for two or three minutes. Two police officers acting as covering officers observed Glover enter the building and when Glover met with them later that same evening he showed them what he had purchased. A subsequent report from the state laboratory disclosed that the

white powder was heroin. When Glover described the seller to one of the officers, that officer recognized the description as that of the defendant and the next day left a photograph of the defendant at the state police headquarters for Glover to view. Glover made an in-court identification of the defendant as the person who had sold him the heroin. The defendant, who lives on Albany Avenue, Hartford, was arrested in July, 1970, at the apartment of Mrs. Virginia Ramsey, 201 Westland Street, Hartford.

The question presented by the defendant's claim that the court erred in refusing to set aside the verdict is whether the trial court abused its discretion. *State* v. *Benton*, 161 Conn. 404, 409, 288 A.2d 411. On the evidence presented, the jury were amply justified in concluding that the state had proven beyond a reasonable doubt that the defendant had possession of and made a sale of heroin. *State* v. *Savage*, 161 Conn. 445, 452, 290 A.2d 221; *State* v. *Brown*, 161 Conn. 219, 222, 286 A.2d 304. The court was not in error in refusing to set aside the verdict.

The defendant claims that the court erred in permitting officer Glover to make an in-court identification of the defendant. The defendant asserts that the court should have determined whether evidence of Glover's observance of the defendant's photograph shortly after the sale was prejudicial before it allowed the in-court identification of the defendant. There was no objection or exception to the evidence when offered and this claim first appears in the defendant's brief. The defendant has not shown that substantial injustice resulted from the admission of this evidence. Unless substantial injustice is shown, a claim of error not made or passed on by the trial court will not be considered on appeal. *State* v. *Bausman*, 162 Conn. 308, 315, 294 A.2d 312; *State* v. *Fredericks*, 154 Conn. 68, 72, 221 A.2d 585.

The defendant, who had testified in his own behalf, assigns error in the court's overruling of his objections to ques-

tions asked of him and one of his witnesses by the state on cross-examination. Detailing the relevant evidence given prior to each question and the objections made would serve no useful purpose. A trial court has wide discretion as to the allowance of questions involving relevancy and remoteness and also as to the scope of cross-examination. *State* v. *Towles*, 155 Conn. 516, 523, 235 A.2d 639; *State* v. *Keating*, 151 Conn. 592, 597, 200 A.2d 724, cert. denied, sub nom. *Joseph* v. *Connecticut*, 379 U.S. 963, 85 S.Ct. 654, 13 L.Ed. 2d 557. The questions asked were proper and relevant to the matters raised by the defendant's own testimony.

There is no error.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

NOWELL A. BRATHWAITE

v.

JOHN MANSON, Commissioner of Correction of the State of Connecticut

Civil No. H-74-209

MEMORANDUM OF DECISION

The petitioner in this habeas corpus proceeding was convicted of possession and sale of heroin in Connecticut Superior Court on January 14, 1971. His conviction was upheld on appeal by the Connecticut Supreme Court. *State* v. *Brathwaite*, 164 Conn. 617 (1973). He is presently in the Connecticut Correctional Institution at Somers for a term of 6 to 10 years. He seeks relief in this court from his imprisonment pursuant to 28 U.S.C. § 2254 (1970).

Factually this case is quite simple. Leaving aside details for the moment, it may be summarized as follows: the State charged that an undercover police officer and informant went to an apartment in Hartford at about 7:45 p.m. on May 5, 1970. After they knocked on the door, it was opened 12 to 18 inches, revealing a man and, standing behind him, a woman.[1]

The officer asked the man for $20 of heroin and paid him that amount. The door closed, then opened again in a few moments, and the man gave the officer two glassine envelopes that were later shown by chemical analysis to contain heroin.

---

[1] The informant testified that only a woman appeared and that the deal was conducted with her. However, he also testified that he was using narcotics at the time and that his memory was generally fuzzy as to what happened when he was using narcotics. The jury evidently disbelieved his version of the transaction.

The officer later identified the seller from a photograph and in court as Brathwaite. Brathwaite admitted that he knew the person who lived in the apartment where the transaction took place and had visited there.[2] However, he testified that he had been home (*i.e.*, at a different address) sick in bed all day on May 5. The defense presented medical testimony as to Brathwaite's ailments and the testimony of his wife that she had been at their home taking care of him throughout the day of May 5, 1970. The jury accepted the prosecution version and convicted.

The sole evidence tying Brathwaite to the possession and sale of the heroin consisted in his identifications by the police undercover agent, Jimmy Glover.[3] Although no objection was raised to these identifications at trial, error in allowing them was claimed (unsuccessfully) on appeal.[4]

The asserted error also forms the basis for the present petition for habeas corpus. Thus there is presented the somewhat paradoxical situation where the state's contemporaneous-objection rule would constitute an adequate state ground precluding Supreme Court review, but leaves open to the plaintiff a habeas remedy in a lower federal court.[5]

---

[2] In fact, Brathwaite was arrested at that apartment on July 27, 1970.

[3] *Cf. United States ex rel. Robinson* v. *Zelker*, 468 F.2d 159, 165 (2d Cir. 1972), *cert. denied*, 411 U.S. 939 (1973) (where other evidence sufficiently supports conviction, allowing unconstitutional identifications into evidence can be harmless error).

[4] Because the point had not been raised at trial the appellate court applied a "plain error" rule, concluding that "[t]he defendant has not shown that substantial injustice resulted from the admission of this evidence." 164 Conn. at 619. It is not clear whether this rule was based on the merits or on procedural grounds or on some meshing of the two.

The Connecticut Supreme Court also considered and rejected claims that the trial court erred in refusing to set aside the jury's verdict because of insufficiency of the evidence and that it erred in several evidentiary rulings. None of these claims are raised here.

[5] "[A] dismissal on the basis of an adequate state ground would not end this case; petitioner might still pursue vindication of his federal claim in a federal habeas corpus proceeding in which the procedural default will not alone precude consideration of his claim, at least unless it is shown that petitioner deliberately bypassed the orderly procedure of the state courts . . . ." *Henry* v. *Mississippi*, 379 U.S. 443, 452 (1965).

The first issue that must be addressed is the procedural one of whether the objections to the identification testimony may be raised here. The habeas statute, 28 U.S.C. § 2254(b) (1970), requires that a prerequisite to this proceeding is exhaustion of state remedies. As to the objections to the identifications, the raising of their propriety on appeal to the Connecticut Supreme Court is sufficient to exhaust Brathwaite's state remedies, even though his counsel failed to object to them at trial.[6] *Cf. United States ex rel. Denegris* v. *Menser*, 247 F. Supp. 826 (D. Conn. 1965), *aff'd*, 360 F.2d 199 (2d Cir. 1966).[7]

The fact that there was no objection at trial raises the spectre of a deliberate bypass of state court procedures that might preclude asserting the objection here. *Cf. Henry* v. *Mississippi*, 379 U.S. 443, 451-452 (1965); *Fay* v. *Noia*, 372 U.S. 391, 438-439 (1963). However, unlike the exhaustion of state remedies, this issue is not a jurisdictional one that a court must raise sua sponte. Rather, it is a defense that may be raised and must be proved by the respondent. *See United States ex*

---

[6] The petitioner also raises a claim that he had ineffective assistance of counsel at his trial because there was no challenge made to Glover's identifications of him. *Cf. Saltys* v. *Adams*, 465 F.2d 1023 (2d Cir. 1972). However, a perusal of Brathwaite's brief on appeal indicates that this issue was not raised in the Connecticut Supreme Court. Nor has Brathwaite sought to raise this claim in a state habeas corpus proceeding, as he may properly do. *Cf. Fredericks* v. *Reincke*, 152 Conn. 501 (1965); *Hodge* v. *Reincke*, 25 Conn. Supp. 207 (Super. Ct.), *appeal dismissed*, 151 Conn. 736 (1964). Thus the exhaustion of state remedies required by 28 U.S.C. § 2254(b) (1970) has not occurred, and the claim of ineffective assistance of counsel will not be passed upon here. *See, e.g., Bartee* v. *Robinson*, Civ. No. H-74-312 (D. Conn. Oct. 8, 1974).

[7] In *DeNegris* I spoke of the "deliberate bypass" problem discussed in *Fay* v. *Noia*, 372 U.S. 391 (1963), as an element of exhaustion analysis. Courts since then have considered the deliberate bypass problem as an independent issue — analogous to waiver — which may prevent presentation of constitutional claims in habeas proceedings even if there has been exhaustion. *See, e.g., Saltys* v. *Adams*, 465 F.2d 1023 (2d Cir. 1972). Considering the latter approach better reasoned, I follow it here.

rel. Cruz v. *LaVallee*, 448 F.2d 671 (2d Cir. 1971), *cert. denied*, 406 U.S. 958 (1972).[8] In this case the state has not contended that Brathwaite waived his right to challenge the identification testimony by the failure of his counsel to object to it at trial.[9] Thus the constitutional objection to its admission is properly before me for decision.[10]

The story behind these identifications is relatively uncomplicated. When Glover left the apartment at which he purchased the heroin he discussed what had occurred with a back-up officer outside, Detective D'Onofrio. He gave a description of the seller to D'Onofrio,[11] who thought he recognized Brath-

---

[8] A more recent decision in this circuit, *United States* v. *West*, 494 F.2d 1314 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3239 (U.S. Oct. 21, 1974), might be read as holding that the court should raise the issue sua sponte and place the burden on the petitioner to show that there was no deliberate bypass. However the procedural posture of that case was not entirely clear. For example, it is not clear whether a hearing was held on the issue of deliberate bypass in *West*. *Cf. Humphrey* v. *Cady*, 405 U.S. 504, 517 (1972). And it is possible, in reading the opinion, to conclude that the government had raised the issue in that case. *Cruz* is quite explicit by contrast. Absent any acknowledgment of *Cruz* or considered treatment of the issue in *West*, I do not read it as overruling *Cruz*.

[9] Indeed neither party addressed this issue, although specifically given leave by the court to brief the effect of the failure of Brathwaite's counsel to object to the admission of the identification evidence. Petitioner instead addressed the somewhat different issue of when a federal appellate court may consider an objection not made at trial. *See, e.g., United States* v. *Rose*, 500 F.2d 12, 17 (2d Cir. 1974). The respondent chose not to address the issue at all.

[10] The consideration of Brathwaite's constitutional point has been submitted to me by the parties for decision on the basis of the record and without a request for an independent factual hearing in this court. This procedure is permissible. The Connecticut Supreme Court's discussion of the evidence introduced at trial does not constitute "a determination after a hearing on the merits of a factual issue . . . evidenced by a written finding, written opinion, or other reliable and adequate written indicia," 28 U.S.C. § 2254(d) (1970); thus I am not bound by their view of the record. But neither does the case require a hearing on the facts underlying Glover's identification testimony, for they are not really in dispute. The question to answer is a legal one: do these facts give rise to a substantial likelihood of irreparable misidentification? *Cf. Townsend* v. *Sain*, 372 U.S. 293, 312 (1963) (emphasis added): "where an applicant for a writ of habeas corpus alleges *facts which, if proved, would entitle him to relief*, the federal court to which the application is made has the power to receive evidence and try the facts anew."

[11] "I described the person as being a colored man, approximately five feet eleven inches tall, dark complexion, black hair, short Afro

waite from what Glover told him. D'Onofrio obtained a picture of Brathwaite from police records and left it at Glover's office. Glover saw the photograph two days after the heroin purchase and identified it as a picture of the person from whom he had made the purchase. In court Glover asserted his positiveness that the photograph depicted the person who had sold him drugs. Glover also identified Brathwaite quite positively in court as the seller.[12]

The standards for the constitutionality of identifications are by now fairly clear. The first inquiry is whether the police used an impermissibly suggestive procedure in obtaining the out-of-court identification from the witness. If the answer is in the affirmative, the second inquiry is whether, under all the circumstances, that suggestive procedure gave rise to a substantial likelihood of irreparable misidentification, both when the photographic identification was made and when the in-court identification was made. *See Neil* v. *Biggers*, 409 U.S. 188, 196-200 (1972); *Simmons* v. *United States*, 390 U.S. 377, 384 (1968); *United States ex rel. Cannon* v. *Montanye*, 486 F.2d 263, 267-268 (2d Cir. 1973), *cert. denied*, 416 U.S. 962 (1974).

In this case Glover's initial identification of Brathwaite was made from a single photograph. There was no array of photographs and no line-up. In this circuit it is clear that this type of identification procedure is impermissibly suggestive. *See United States* v. *Reid*, Dkt. Nos. 74-2598, 74-2599 (2d Cir. Apr. 24, 1975); *United States ex rel. John [Armstrong]* v. *Cascles*, 489 F.2d 20, 24 (2d Cir. 1973), *cert. denied*, 416 U.S. 959 (1974); *United States ex rel. Gonzalez* v. *Zelker*, 477 F.2d 797, 801 (2d Cir.), *cert. denied*, 414 U.S. 924 (1973). Thus I pass to the second inquiry.

---

style, and having high cheekbones, and of heavy build. He was wearing at the time blue pants and a plaid shirt." Tr. 36-37.

[12] Glover testified that he had not seen Brathwaite between the time he identified the photograph and the time he saw him in court. Tr. 41.

The Supreme Court in *Neil* v. *Biggers*, 409 U.S. 188, 199-200 (1972), spelled out the factors to be considered in determining whether there has arisen a substantial likelihood of irreparable misidentification:

> "As dictated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. . . ."

Applying these factors to the instant case indicates that no substantial likelihood of irreparable misidentification exists here. Glover was within two feet of the seller, standing across the threshold of the apartment from him. The exact duration of the confrontation is unclear from the record, but it lasted at least a couple of minutes. Tr. 19, 29-33, 60. Although there was no artificial lighting in the hallway where Glover was standing, there was natural light coming through a window or skylight.[13] Glover and the informant both testified that there was adequate light to see clearly in the hall. Tr. 28, 47. Thus Glover had a fairly good opportunity to observe the seller. Glover certainly was paying attention to identify the seller: he was a trained police officer who realized that he would later have to find and arrest the person with whom he was dealing. This conclusion is bolstered by the detailed nature of the description Glover gave his back-up officer, D'Onofrio.[14] There is no direct evidence on the accuracy of this description, but its reliability is supported by the fact that it allowed D'Onofrio

---

[13] The incident occurred at about 7:45 p.m. on May 5, 1970. Glover testified that it was still daylight and that the day had been clear and sunny. Tr. 27.

[14] *See* note 11 *supra*.

to pick out a single photograph that was thereafter positively identified by Glover. Only two days elapsed between the crime and Glover's photographic identification. Although another eight months passed before the in-court identification Glover had "no doubt in [his] mind whatsoever" that the defendant was the person who had sold him heroin. Tr. 34, 41-42.

The identification testimony was not unconstitutional. "So long as the prosecution can demonstrate that the witness had some opportunity to observe the offender at the time of the crime, the witness can make an in-court identification and can testify concerning the pretrial identification regardless of the suggestiveness of the pretrial proceedings." Pulaski, *"Neil* v. *Biggers:* The Supreme Court Dismantles the *Wade* Trilogy's Due Process Protection," 26 Stan. L. Rev. 1097, 1120 (1974). The petition is dismissed. It is

SO ORDERED.

Dated at Hartford, Connecticut, this 13th day of May, 1975.

M. Joseph Blumenfeld
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 235 — September Term, 1975.

(Argued October 10, 1975 Decided November 20, 1975.)

Docket No. 75-2093

NOWELL A. BRATHWAITE,
Petitioner-Appellant,

v.

JOHN R. MANSON, Commissioner of Correction
of the State of Connecticut,
Respondent-Appellee.

Before:

KAUFMAN, *Chief Judge,*
and FRIENDLY and SMITH, *Circuit Judges.*

Appeal from an order of the District Court for Connecticut, M. Joseph Blumenfeld, *Judge,* denying a state prisoner's application for a writ of habeas corpus on the ground of allegedly unconstitutional identification procedures.

Reversed.

DAVID GOLUB, Esq., West Hartford, Conn. (Martha Stone, Esq., West Hartford, Conn., of Counsel), *for Appellant.*

BERNARD D. GAFFNEY, Assistant State's Attorney (George D. Stoughton, State's Attorney, State of Connecticut, of Counsel), *for Appellee.*

FRIENDLY, *Circuit Judge:*

On this appeal from an order of the District Court for Connecticut denying a state prisoner's petition for habeas corpus, we are confronted, as we recently were in *United States* v. *Reid,* 517 F.2d 953, 965-67 (2 Cir. 1975), with a defendant's claim that his constitutional rights were compromised by the prosecution's display of his photograph singly to a witness for identification. Although the facts are much less favorable to the prosecution than in *Reid,* the State claims to be entitled to prevail under the Supreme Court's latest identification decision, *Neil* v. *Biggers,* 409 U.S. 188 (1972).[1]

I.

The district court was not asked to conduct an evidentiary hearing, and we take the facts, as it did, from the state trial record.

Trooper Glover of the Connecticut State Police, who had been assigned to the Hartford narcotics squad in an undercover capacity, went with an informant, Henry Brown, around 7:45 p.m. on the evening of May 5, 1970, to an apartment on the third floor of a building at 201 Westland Street.[2] He knocked at the door of the apartment. When it was opened, he observed a man standing in front of a woman and asked for "two things" of narcotics. The door was closed for a few moments and then was reopened. The man had two glassine envelopes containing a white powder, later determined to be

[1] Excluding the identification cases turning on the right to counsel, the relevant earlier decisions are *Stovall* v. *Denno,* 388 U.S. 293 (1967); *Simmons* v. *United States,* 390 U.S. 377 (1968); *Foster* v. *California,* 394 U.S. 440 (1969); and *Coleman* v. *Alabama,* 399 U.S. 1 (1970).

[2] The record suggests that Glover and Brown may have intended to go to the apartment of "Dickie Boy" Cicero, a known narcotics dealer, who lived on the left side of the third floor, but by mistake went instead to that of Virginia Ramsey on the right side.

heroin, for which Glover paid $20.[3] Glover was within two feet of the seller and observed his face for two or three minutes; natural light was coming through a window at the hallway and Glover claimed to have had no difficulty in seeing.

When Glover left the building, he reported to a back-up officer outside, Detective D'Onofrio. He described the seller as being "a colored man, approximately five feet eleven inches tall, dark complexion, black hair, short Afro style, and having high cheekbones, and of heavy build. He was wearing at the time blue pants and a plaid shirt." D'Onofrio went back to the police records division and obtained a photograph of petitioner Brathwaite. D'Onofrio testified that he selected this photograph because he recognized Brathwaite as the person described by Glover and that he had previously seen Brathwaite "several times, mostly in his vehicle."[4] D'Onofrio took the photograph to the office of Glover's squad. On May 7 Glover identified it as depicting the seller of the narcotics. For reasons not disclosed by the record, Brathwaite was not arrested until late July, 1970; the arrest took place in Mrs. Ramsey's apartment at 201 Westland Street, see n.2.

At the trial in January, 1971, Glover testified to the photographic identification and also made an in-court identification of Brathwaite, who was sitting at the defense counsel table. He had no doubt about the identifications. The state presented no other evidence to show that Brathwaite was the seller.

---

[3] This was Glover's testimony. Brown, called as a prosecution witness, testified in direct examination that he had no clear memory of the incident, owing, he claimed, to drug intoxication. On cross-examination he recalled, as he had in a conversation with the defense attorney on the preceding day, that only a woman opened the door and later produced the narcotics.

[4] The prosecutor sought to elicit that D'Onofrio had seen Brathwaite in the vicinity of the apartment house but the court sustained an objection.

Brathwaite testified that at the time of the sale he was at home, suffering from a variety of ailments including a serious back condition which had kept him from going out for several days. On the following day, May 6, he went to a doctor's office pursuant to a previously made appointment. According to him, Mrs. Ramsey was a friend of the family, who had driven his car when his back condition prevented him from doing so; she had called for him after he had had a myelogram at a hospital in July and also had driven him to her apartment on the day he was arrested there. Mrs. Brathwaite confirmed that her husband had been ill at home all day on May 5 and testified that Mrs. Ramsey had driven him to a doctor's office on May 6. Dr. Vietzke testified that Brathwaite had been assigned to him as a clinic patient on April 15; that he had found a lack of sensation in Brathwaite's legs which could (and ultimately was found to) indicate a disc involvement; that Brathwaite "moved like a man in great discomfort"; and that he referred Brathwaite to Dr. Owens, a neurosurgeon. Brathwaite's May 6 appointment was at the neurosurgical clinic where he was seen by Dr. Owens.

The jury having returned a verdict of guilty, Brathwaite appealed his conviction to the Supreme Court of Connecticut which affirmed, *State* v. *Brathwaite*, 164 Conn. 617 (1973). The portion of its opinion dealing with the identification issue is as follows, 164 Conn. at 619:

> The defendant claims that the court erred in permitting officer Glover to make an in-court identification of the defendant. The defendant asserts that the court should have determined whether evidence of Glover's observance of the defendant's photograph shortly after the sale was prejudicial before it allowed the in-court identification of the defendant. There was no objection or exception to the evidence when offered and this claim first appears in the defendant's brief. The defendant has not shown

> that substantial injustice resulted from the admission of this evidence. Unless substantial injustice is shown, a claim of error not made or passed on by the trial court will not be considered on appeal. *State* v. *Bausman*, 162 Conn. 308, 315, 294 A.2d 312; *State* v. *Fredericks*, 154 Conn. 68, 72, 221 A.2d 585.

This was followed by a petition for federal habeas and its denial by the district court.

II.

We must first consider the effect of the lack of objection to either the in-court or the photographic identification. As Judge Blumenfeld noted, this has two closely related aspects — the failure to exhaust state remedies and the effect of the state's contemporaneous objection rule on the availability of federal habeas.

As we read the opinion of the district judge, he regarded the consideration of petitioner's identification argument by the Supreme Court of Connecticut as meeting the exhaustion requirement of 28 U.S.C. § 2254(b) and (c). We are not so sure. It is, of course, true that plenary consideration of such an objection by a state appellate court meets the exhaustion requirement even though, under ordinary procedural rules, the court was not obliged to give this. However, our reading of its opinion leads us to believe that the Supreme Court of Connecticut considered the point on a more limited basis, namely, whether even if petitioner's objections were sound, "substantial injustice resulted" from receipt of the identifications. It is doubtful whether such limited review would meet the exhaustion requirement if Connecticut provided a method for raising the federal claim in a collateral attack. The presentation to a state appellate court which obviates any need for resort to state collateral proceedings, *Brown* v. *Allen*, 344 U.S. 443, 448-49 n.3 (1953), is predicated on a disposition on the

merits which would foreclose a successful collateral proceeding. We believe, however, that the Connecticut Supreme Court's disposition of petitioner's claim, while less than a full consideration on the merits, would be considered by the Connecticut courts to be enough to bar a subsequent collateral proceeding since "Connecticut's rule [is] that [state] habeas corpus cannot serve as an appeal for questions which might have been raised for direct review," *United States* v. *Menser*, 247 F. Supp. 826, 829 (D.C. Conn. 1965); *Wojculewicz* v. *Cummings*, 143 Conn. 624, 628, 124 A.2d 886, 890-91 (1956). If this be so, the exhaustion requirement of 28 U.S.C. § 2254 would pose no obstacle to petitioner since "§ 2254 is limited in its application to failure to exhaust state remedies still open to the habeas applicant at the time he files his application in federal court." *Fay* v. *Noia*, 372 U.S. 391, 435 (1963).

However, it is unnecessary to decide this since the respondent has not here raised a claim of failure to exhaust state remedies, and the requirement is not jurisdictional but merely a principle of comity, *id.* at 434-35. For the same reason, namely, the State's failure to raise the point here, we need not consider whether *Fay* v. *Noia*, *supra*, 372 U.S. at 426-34, 438-40, would be read today as relieving Brathwaite, in federal habeas, of his counsel's procedural default, even though, for the reason indicated above, we doubt whether the Connecticut Supreme Court's limited consideration of Brathwaite's objections would bring the case within the principle of *Warden* v. *Hayden*, 387 U.S. 294, 297 n.3 (1967), that a state may not assert "deliberate by-pass" when a petitioner's constitutional claims have in fact been passed upon by a state court despite breach of a contemporaneous objection rule.

III.

Respondent concedes that exhibition of the single photograph of Brathwaite to Glover was "impermissibly suggestive" within many decisions of this court. See, *e.g.*, *United States ex*

rel. Gonzalez v. *Zelker*, 477 F.2d 797, 801 (2 Cir. 1973), *cert. denied*, 414 U.S. 924 (1974); *United States ex rel. John* v. *Casscles*, 489 F.2d 20, 24 (2 Cir. 1973), *cert. denied*, 416 U.S. 959 (1975); *United States* v. *Reid*, *supra*. Not only was it impermissibly suggestive[5] but, despite the unexplained statement to the contrary in respondent's brief, it was unnecessarily so. There was no emergency that prevented D'Onofrio from assembling a suitable array of photographs from the many fitting Glover's description that must have been available in the files of the Hartford Police Department. In fact there was little urgency that D'Onofrio waited two days to display Brathwaite's photo for Glover's identification and three months to make Brathwaite's arrest. D'Onofrio selected the single photograph not because of any difficulty in securing more but because, without having witnessed the event, he was certain Brathwaite had made the sale, see fn. 5.

Prior to *Neil* v. *Biggers*, *supra*, this alone would have permitted a speedy resolution of the case. This court and others had held that, except in cases of harmless error, a conviction secured as the result of admitting an identification obtained by impermissibly suggestive and unnecessary measures could not stand, see *e.g.*, *United States* v. *Fernandez*, 456 F.2d 638, 641-42 (2 Cir. 1972); *Kimbrough* v. *Cox*, 444 F.2d 8 (4 Cir. 1971); *United States* v. *Fowler*, 439 F.2d 133 (9 Cir. 1971); *Mason* v. *United States*, 414 F.2d 1176 (D.C. Cir. 1969), although, following the lead of *United States* v. *Wade*, 388 U.S. 218, 239-40 (1967), we allowed the prosecution to by-pass the tainted identification and introduce subsequent identifications

[5] The impermissible suggestiveness evoked by the presentation of a single photograph was enhanced by D'Onofrio's earlier statement to Glover that, on the basis of the latter's extremely general description of the seller of narcotics, D'Onofrio knew who the man was. D'Onofrio's subsequent presentation of Brathwaite's photograph was in substance a request to Glover to endorse his conclusion that, despite his own lack of observation of the sale, Brathwaite was the man.

or have the witness make an in-court identification[6] if satisfied that these stemmed from the original observation of the defendant rather than the tainted identification. *United States ex rel. Phipps* v. *Follette*, 428 F.2d 912 (2 Cir. 1970), *cert. denied*, 400 U.S. 908 (1970); *United States ex rel. Gonzalez* v. *Zelker*, *supra*, 477 F.2d at 801-05. Here there would have been no occasion to consider whether Glover's in-court identification rested on his original observation (except for the bearing of this on a new trial) since the admission of the photographic identification would have been fatal constitutional error.

A passage in *Neil* v. *Biggers*, *supra*, 409 U.S. at 198, calls this analysis into some question. After saying that "the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification,'" the inner quote being from *Simmons* v. *United States*, *supra*, 390 U.S. at 384, Mr. Justice Powell continued:

> While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of "irreparable" it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself.[5] It is the

[6] The difference for the prosecution between being allowed to offer evidence of a pretrial identification and being remitted to an in-court identification is substantial. A jury would naturally regard an identification made shortly after the crime as much more probative than an in-court identification. This is especially true of the perfunctory type of identification where the defendant is sitting at the counsel table; indeed it would seem that only the apparent weakness of this kind of identification, along with its traditional character, saves it from condemnation as being itself impermissibly suggestive. On the other hand, if the defendant is placed with spectators, in-court identifications have been known to go wrong — sometimes because the defendant will have deliberately altered his appearance. Moreover, cross-examination may seriously weaken an in-court identification; the prosecution suffers a real loss if not allowed to buttress this with an earlier one.

[7] A commentator has described the *Stovall* test as having

> focused exclusively on the propriety or impropriety of the police conducted identification procedure in light of two factors: (1) the identification procedure employed was suggestive and

> likelihood of misidentification which violates a defendant's right to due process, and it is this which was the basis of the exclusion of evidence in *Foster*. Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous. But as *Stovall* makes clear, the admission of evidence of a showup without more does not violate due process. (Footnote omitted.)

If this stood alone, it would strongly support a conclusion that the Court intended the "very substantial likelihood of misidentification" test[7] to apply to show-up or photographic identifications that were impermissibly and unnecessarily suggestive as well as to later out-of-court or in-court identifications.[8]

However, Mr. Justice Powell also said, 409 U.S. at ~~198-99~~ 198-199:

> What is less clear from our cases is whether, as intimated by the District Court, unnecessary suggestiveness alone requires the exclusion of evidence . . . . The purpose of a strict rule barring evidence of unnecessarily suggestive confrontations would be to deter the police from using a less reliable procedure where a more reliable one may be available and would not be based on the assumption that in every instance the admission of evidence of such a confrontation offends due process. *Clemons* v. *United States*, 133 U.S. App. D.C. 27, 48, 408 F.2d 1230, 1251 (1968) (Leventhal, *J.*, concurring); cf. *Gilbert* v. *California*, 388 U.S. 263, 273 (1967); *Mapp* v. *Ohio*, 367 U.S. 643 (1961). Such a rule would have no place in the present case, since both the confrontation and the trial preceded *Stovall* v. *Denno*, *supra*, when we first gave notice that the suggestiveness of confrontation procedures was anything other than a matter to be argued to the jury.

---

conductive to irreparable misidentification, and (2) whether the identification procedure was "unnecessary." (footnotes omitted)

whereas the *Simmons* test decided

> the due process inquiry by looking at the result: Given the facts of the case, how likely was it that the eyewitness misidentified the defendant?

Pulaski, *Neil* v. *Biggers*, The Supreme Court Dismantles the *Wade* Trilogy's Due Process Protection, 26 Stan. L. Rev. 1097, 1107-08 (1973).

[8] The last sentence in the quotation deserves close reading. We had understood *Stovall* to mean that admission of the identification at the impermissibly suggestive hospital show-up (as distinguished from later identifications) would have led to a reversal in that case except for the necessity imposed by what was considered to be the victim's precarious health. 388 U.S. at 302. The latter must be what was meant by the phrase "without more."

Although the commentators differ concerning the meaning of this passage,[9] we think that, at minimum, it preserves, in cases where both the confrontation and the trial were subsequent to *Stovall*, the principle requiring the exclusion of identifications resulting from "unnecessarily suggestive confrontation." This construction is powerfully supported by the citations in the last quotation. The passage in Judge Leventhal's concurring opinion in *Clemons* v. *United States*, 408 F.2d at 1251, drew a sharp distinction between "post-*Wade* trials" and a case where "a trial, as well as the identification, has taken place prior to *Wade* and *Stovall*." The *Clemons* majority had also said that the exclusionary rule "would appear to be applicable with respect to prosecution evidence of post-*Stovall* pre-trial identifications found by the court to be violative of due process," 408 F.2d 1236-37 (McGowan, *J.*,); see also the characterization of the majority's position in Judge Wright's concurring and dissenting opinion, 408 F.2d at 1252-53. Equally clearly the citations to *Gilbert* and *Mapp* point to a principle of exclusion. It is true, as the commentators have pointed out, that there is some novelty in applying the non-retroactivity principle to this portion of the *Stovall* opinion, 388 U.S. at 201-02, which

---

[9] See Pulaski, *supra*, 26 Stan. L. Rev. at 1116-18; Grano, *Kirby, Biggers and Ash: Do any Constitutional Safeguards Remain against the Danger of Convicting the Innocent?*, 72 Mich. L. Rev. 717, 773-86 (1974).

reads on its face as if it were to have the usual application[10] as distinguished from the solely prospective authority decreed for the *Wade* and *Gilbert* decisions. But experience may have convinced the Court that retroactive application of this portion of *Stovall* also would have too drastic an effect on law enforcement; it was, as said in *Neil* v. *Biggers, supra,* 409 U.S. at 199, the first occasion on which the Court "gave notice that the suggestiveness of confrontation procedures was anything other than a matter to be argued to the jury."

This interpretation of *Neil* v. *Biggers* — that it qualified the *Stovall* standard only with respect to pre-*Stovall* cases — has been adopted expressly by the Fourth Circuit, *Smith* v. *Coiner,* 473 F.2d 877, 880-81 (1973), *cert. den. sub nom. Wallace* v. *Smith,* 414 U.S. 1115 (1973), and seemingly by the Fifth Circuit, *Rudd* v. *State of Florida,* 477 F.2d 805, 809 (1973), and the Sixth Circuit, *Workman* v. *Cardwell,* 471 F.2d 909, 910 (1972), *cert. denied,* 412 U.S. 932 (1973). Cf. *Souza* v. *Howard,* 488 F.2d 462, 465 (1 Cir. 1973), *cert. denied,* 417 U.S. 933 (1974). We do not consider that *United States* v. *Evans,* 484 F.2d 1178, 1186 n.8 (1973), committed us to a contrary position. In that case the prosecution offered only an in-court identification and the tainted previous photographic identification was introduced by defense counsel in an effort to impeach the direct testimony of the identifying prosecution witnesses. See *United States* v. *Evans,* 72 Crim. 910 Transcript at 118, 136. We read the footnote as meaning only that the court rejected in light of *Neil* v. *Biggers,* a *per se* exclusionary rule for in-court identifications because the prosecution has used a less reliable method for obtaining a prior identification when a more reliable one was available.[11] On the other hand,

[10] Some might prefer "what used to be the usual application."

[11] The subsequent history of the *Evans* case illustrates the dangers of in-court identifications after suggestive pre-trial identification. As a result of the later arrest and confession of another person, the United States Attorney consented to an order vacating Evan's conviction. See the order of the District Court for the Southern District of New York dated November 5, 1975, in 75 Civ. 2253; see also order of the same date in 72 Cr. 204.

the treatment of the problem in *United States* v. *Boston,* 508 F.2d 1171 (2 Cir. 1974), is consistent without analysis.

These conclusions, based upon a textual analysis of *Neil* v. *Biggers* and the subsequent decisions of the courts of appeals, are reinforced when the case is placed in its setting. A good starting place is Mr. Justice Brennan's observation in *United States* v. *Wade, supra,* 388 U.S. at 228:

> The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification

and the large body of literature cited in footnotes 6 and 7 388 U.S. at 228-29 to support this. The *Wade* and *Gilbert* decisions represented one way of responding with respect to lineups; this was supplemented by the ruling in *Stovall* that due process was violated by receiving an identification arising from a confrontation which is "unnecessarily suggestive and conducive to irreparably mistaken identification," 388 U.S. at 301-02. The subsequent statement in *Stovall* that "a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it" was not a blanket invitation to use suggestive confrontations whenever a witness might reasonably be expected to be able to resist the suggestion. It was directed at the particular need for the confrontation there at issue — that the immediate showing of Stovall to the hospitalized victim, Mrs. Behrendt, was imperative[12] — not to the fact that the hospital identification was

[12] As the writer of a dissent to this court's en banc affirmance of the denial of habeas in *Stovall,* 355 F.2d at 744, I have always wondered why the Supreme Court so readily accepted the view that Mrs. Behrendt was *in extremis* at the time of the show-up, see 355 F.2d at 744, and failed to consider why if five police officers and prosecutors could have been assembled in her hospital room without danger to her health, one or two blacks could not have been found and allowed to accompany Stovall.

almost certainly correct. Significantly the Court did not refer to the large amount of circumstantial evidence, see 355 F.2d at 733-34, which made it almost certain that there was no misidentification.

The Court next encountered the problem in *Simmons* v. *United States, supra,* 390 U.S. 377.[13] In contrast to *Stovall,* where the witness had testified to the show-up identification as well as making an in-court identification, the witnesses in *Simmons* had done only the latter. It was in this context that Mr. Justice Harlan said, 390 U.S. at 384:

> [W]e hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

We do not regard this language as departing from the brief statement in *Stovall.* Indeed Justice Harlan said his standard accorded with the Court's "resolution of a similar issue" in *Stovall,* 390 U.S. at 394. The language was different because the issue was different. *Stovall* held that where the police or a prosecutor had engaged in indefensible identification procedures, they must be deprived of the immediate fruits. *Simmons* held, consistently with the Court's approach in *Wade* (which in turn had relied, 388 U.S. at 341, on the doctrine with respect to fruits of a primary illegality announced in *Wong Sun* v. *United States,* 371 U.S. 471, 488 (1963)), that such an error should not always deprive the Government of testimony of later identifications that might be essential to a

[13] Although *Simmons* involved the use of photographs rather than a show-up, it has never been suggested that there should be a less stringent rule for the presentation of a single photograph than for a show-up.

conviction; it should do so only when the error was irreparable. See *United States ex rel. Phipps* v. *Follette, supra,* 428 F.2d at 914 n.2. In *Foster* v. *California, supra,* 394 U.S. 440, which, like *Stovall,* involved both testimony as to an improper lineup identification and an in-court identification, the Court returned to the *Stovall* formulation, 394 U.S. at 442, and added that "it is the teaching of *Wade, Gilbert* and *Stovall, supra,* that in some cases *the procedure* leading to an eyewitness identification may be so defective as to make the identification constitutionally inadmissible as a matter of law," 394 U.S. at 442-43 n.2 (emphasis supplied).

As cases in the wake of *Stovall* and *Simmons* began to reach them, the courts of appeals tended to use the *Simmons* formulation. Stress was placed on such factors as the witness' opportunity and incentive for observation at the time of the crime, the accuracy of description furnished before the suggestive identification, the witness' level of certainty, the lengths of time between the crime and identification and the trial, and even the existence of other evidence tending to show that the identification was not mistaken. See, *e.g., United States ex rel. Rutherford* v. *Deegan,* 406 F.2d 217 (2 Cir.), *cert. denied,* 395 U.S. 983 (1969); *United States ex rel. Phipps* v. *Follette, supra,* 428 F.2d 912; *United States ex rel. Frasier* v. *Henderson,* 464 F.2d 260 (2 Cir. 1972). But in the cases cited and at least most of the others the prosecution, following the lead of *Wade,* relied only on a subsequent, usually in-court identification,[14] and the language from *Simmons* was treated as a sort of combination of the *Wade* independent source principle with a

[14] An exception in this circuit is *United States* v. *Abbate,* 451 F.2d 990, 992 (2 Cir. 1971), in which the court mentioned the *Simmons* test in connection with a suggestive out-of-court identification but seems ultimately to have relied on a finding of harmless error. Since a remand was found necessary in *United States ex rel. Cannon* v. *Montanye,* 486 F.2d 263, 266-68 (2 Cir. 1973), which involved both an out-of-court and an in-court identification, the court was not required to and did not decide whether the same standards should govern both.

caution — perhaps due to a realization that the effect of the prior identification could never be wholly eradicated — that this might not suffice to avoid reversal unless the court was fairly assured that no harm was being done. The prosecution generally did not even assert that a suggestive identification made without an imperative necessity, such as existed in *Stovall* or in the immediate confrontation cases such as *Bates* v. *United States*, 405 F.2d 1104 (D.C. Cir. 1968) (Burger, *J.*), and *Russell* v. *United States*, 408 F.2d 1280 (D.C. Cir.), *cert. denied*, 395 U.S. 928 (1969), could themselves be received in evidence.

In light of this survey and our analysis of the opinion itself, we do not think *Neil* v. *Biggers* intended to change the rule previously applied, except to subject to the more lenient *Simmons* test impermissibly and unnecessarily suggestive pre-*Stovall* identifications. For such post-*Stovall* identifications the rule remains as *Stovall* and *Simmons* left it. Evidence of an identification unnecessarily obtained by impermissibly suggestive means must be excluded under *Stovall*, and the more lenient *Simmons* language and the criteria worked out under it apply only to identification subsequent to the impermissible show-up, with the prosecution having the burden of proving that the precautionary conditions of *Simmons* have been met. No rules less stringent than these can force police administrators and prosecutors to adopt procedures that will give fair assurance against the awful risks of misidentification.

IV.

Even if we should be wrong in all this and *Neil* v. *Biggers* was intended to apply the *Simmons* test to post-*Stovall* show-ups or photographic displays that were impermissibly and unnecessarily suggestive, as well as to in-court identifications following upon them, the writ should issue here. Although Glover testified that the hallway was well lit by sunlight, we

can take judicial notice that on May 5, 1970 sunset at Hartford took place at 7:53 p.m. While Glover was a "trained observer," see *United States* v. *Reid*, *supra*, 517 F.2d at 966, he was in a very different position from Agent Shea in that case. Shea had been the victim of a brutal assault; Glover was acting as an undercover agent — whose business was to cause arrests to be made — and his description of the suspect, while apparently covering Brathwaite, could have applied to hundreds of Hartford black males. The certainty of identification is far less persuasive when the expressions come from the lips of an undercover agent, especially under the circumstances developed in notes 2 and 3, than when they are the words of an ordinary citizen, whether a bystander or a victim. The in-court identification has little meaning; Brathwaite was at the counsel table and Glover must have made dozens of identifications in the eight months between the narcotics sale and the trial. Perhaps the strongest bit of evidence to strengthen the identification was Brathwaite's arrest in the very apartment where the sale was made. But Brathwaite offered an explanation of this which was not implausible, although evidently not credited by the jury, and the long and unexplained delay in his arrest is troubling. Assuming, which we do not believe, that *Simmons* states the appropriate test for both of Glover's identifications, we hold that both were inadmissible. The danger that Brathwaite was convicted because he was a man whom Detective D'Onofrio had previously observed near the scene of the crime, thought to be a likely offender, and arrested when he was known to be in Mrs. Ramsey's apartment, rather than because Glover really remembered him as the seller, is too great to let this conviction stand.

The judgment is reversed with instructions to issue the writ unless Connecticut gives notice of a desire to retry Brathwaite within twenty days after issuance of the mandate and the retrial occurs within such reasonable period thereafter as the district judge may fix.

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-871

JOHN R. MANSON, COMMISSIONER OF CORRECTION
OF THE STATE OF CONNECTICUT,
Petitioner,

v.

NOWELL A. BRATHWAITE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 20, 1975
CERTIORARI GRANTED MAY 3, 1976

INDEX

1. RELEVANT DOCKET ENTRIES

(a) United States District Court for the District of Connecticut:

(1) June 28, 1974. Petition for writ of habeas corpus.

(2) July 2, 1974. Order to show cause why a writ of habeas corpus should not be issued.

(3) July 15, 1975. Order appointing Martha Stone, Esquire, as attorney for petitioner.

(4) July 15, 1974. Return of respondent.

(5) May 13, 1975. Memorandum of decision.

(6) May 21. 1975. Judgment.

(7) May 22, 1975. Notice of appeal.

(b) United States Court of Appeals for the Second Circuit:

(1) July 30, 1975. Order appointing Martha Stone, Esquire, as counsel on appeal.

(2) November 20, 1975. Opinion and judgment.

(3) December 5, 1975. Motion to stay issuance of mandate pending petition for writ of certiorari.

(4) December 19, 1975. Order staying issuance of mandate.

2. RELEVANT PLEADINGS, OPINIONS, AND JUDGMENTS

(a) Pleadings (United States District Court for the District of Connecticut):

(1) Petition for writ of habeas corpus (filed June 28, 1974):

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

CIVIL No. H 74-209

NOWELL A. BRATHWAITE,

Petitioner,

v.

JOHN MANSON, Commissioner of Corrections of the State of Connecticut,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

Now comes the Petitioner Nowell A. Brathwaite and petitions this Court for a writ of habeas corpus, pursuant to 28 U.S.C. § 2241, upon the following facts:

1. Petitioner is currently incarcerated at the Connecticut Correctional Institution at Somers, Connecticut, where he is serving a sentence of six to ten years pursuant to convictions on January 14, 1971 for sale of a narcotic drug and possession of a narcotic drug, after jury trial in Connecticut Superior Court at Hartford.

2. Respondent is the Commissioner of Corrections of the State of Connecticut, in whose custody petitioner is presently confined.

3. Petitioner's trial was conducted in violation of his rights under the Fifth and Fourteenth Amendments of the United States Constitution, in the following respects:

A. Testimony regarding an out-of-court photographic identification of the petitioner was improperly admitted into evidence at trial.

i. At petitioner's trial, police undercover agent Jimmy Glover testified that on May 5, 1970, he and police informant Henry Brown conducted a narcotics transaction with an unknown male subject. Glover further testified that at the time of the alleged transaction neither he nor Brown knew the identity of the third party involved.

ii. Hartford Police Department Detective Michael D'Onofrio testified at trial that based upon a physical description of this unknown party supplied by Glover, he (D'Onofrio) selected a police Records Division photograph of petitioner for possible identification by Glover. D'Onofrio further testified that petitioner was not personally known to him at this time.

iii. On May 7, 1970, Glover was shown this single photograph of petitioner and identified the subject therein as the person from whom he had purchased narcotics two days earlier.

iv. Glover neither identified petitioner Brathwaite in a line-up, nor viewed any array of photographs, although, as D'Onofrio testified at trial, Brathwaite was, in fact, available for a line-up and a photographic array could have been arranged.

v. Glover was permitted to testify at trial as to his photographic identification of petitioner on May 7, 1970.

vi. Henry Brown, who was present at the alleged sale, testified at trial that petitioner was not the person with whom the sale had been transacted. Brown further testified that a woman had made the sale to Glover.

vii. Glover's photographic identification of petitioner, which formed the sole basis for petitioner's conviction, resulted from impermissible and unnecessarily suggestive identification procedures produced a substantial likelihood of misidentification, in violation of petitioner's rights under the Fifth and Fourteenth Amendments of the United States Constitution.

B. Testimony regarding an in-court identification of petitioner was improperly admitted into evidence at trial.

i. Petitioner's trial was held approximately eight months after the alleged narcotics transaction. Glover testified that during this eight month period he had not seen petitioner.

ii. At trial, Glover made an in-court identification of petitioner as the third party involved in the narcotics transaction.

iii. Glover's in-court identification of petitioner was irreparably tainted by the prior unlawful photographic identification, in violation of petitioner's rights under the Fifth and Fourteenth Amendments of the United States Constitution.

4. Petitioner's convictions were appealed to the Connecticut Supreme Court on the grounds stated herein. Petitioner's convictions were affirmed on May 1, 1973.

Because of the foregoing facts, petitioner is being restrained of his liberty by the respondents in violation of the Constitution of the United States, and he therefore prays that this petition for a writ of habeas corpus be granted and an order be entered discharging him from custody.

Respectfully submitted,

NOWELL A. BRATHWAITE
PETITIONER
PRO SE

(2) Return of respondent (filed July 15, 1974):

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

CIVIL No. 74-209

NOWELL A. BRATHWAITE,

v.

JOHN MANSON, Commissioner of Correction of the State of Connecticut,

RETURN OF RESPONDENT

1. The Respondent, John Manson, is the Commissioner of Correction of the State of Connecticut.

2. On February 5, 1971, after a trial by jury, the petitioner was sentenced to be imprisoned in the Connecticut Correctional Institution (formerly the Connecticut State Prison) as follows:

Count 1. Violation of an Act Relating to Dependency-Producing Drugs (Sale of narcotics)

Count 2. Violation of an Act Relating to Dependency-Producing Drugs (Possession of narcotics)

On the first count for a term of not less than six nor more than nine years, on the second count for a term of one year, for an effective sentence of not less than six nor more than ten years.

3. Thereafter, on February 5, 1971, the petitioner was duly delivered to the Warden of the Connecticut Correctional Institution on a mittimus issued by the Superior Court for Hartford County pursuant to said sentence.

4. The respondent holds the petitioner by virtue of the foregoing proceedings.

BY WAY OF ANSWER

5. Paragraph 1 is admitted.

6. Paragraph 2 is admitted.

7. Paragraph 3 is denied.

8. Paragraph 4 is admitted.

BY WAY OF AFFIRMATIVE DEFENSE

9. The State of Connecticut post-conviction procedures afford an adequate remedy for the petitioner, and these remedies are available to him.

10. The Courts of the State of Connecticut have not had an opportunity to pass on the claims alleged in the petitioner's application.

11. Although exhaustion of state remedies is not a jurisdictional requirement, it is a doctrine based on comity and codified by statute, and the petitioner has failed to exhaust state remedies or to follow the procedures established by the State of Connecticut available to him.

JOHN MANSON, Commissioner of Correction
of the State of Connecticut, Respondent

By .....

JOHN D. LABELLE
State's Attorney
for Hartford County

(b) Opinions:

(1) The opinion of the Connecticut Supreme Court (*State* v. *Brathwaite*, 164 Conn. 617, 325 A.2d 284) is printed in the Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, pp. 1a to 4a.

(2) The Memorandum of Decision of the United States District Court for the District of Connecticut (*Nowell A. Brathwaite* v. *John Manson, Commissioner of Correction of the State of Connecticut*, Civil No. H 74-209) is printed in the aforesaid Appendix, pp. 5a to 11a.

(3) The opinion of the United States Court of Appeals for the Second Circuit (*Brathwaite* v. *Manson*, 527 F.2d 363 [1975])is printed in the aforesaid Appendix, pp. 12a to 27a.

(c) Judgments:

(1) Judgment of United States District Court for the District of Connecticut:

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

CIVIL No. H 74-209

NOWELL A. BRATHWAITE,

v.

JOHN MANSON, Commissioner of Corrections of the State of Connecticut,

JUDGMENT

The above-entitled action came on for consideration by the Court by the Honorable M. Joseph Blumenfeld, United States District Judge.

And the Court having filed its Memorandum of Decision, denying the Petitioner's Petition for a Writ of Habeas Corpus and dismissing the action;

It is accordingly ORDERED and ADJUDGED that the Petitioner's Petition be and is hereby dismissed.

Dated at Hartford, Connecticut, this 20th day of May, 1975.

SYLVESTER A. MARKOWSKI
Clerk, United States District Court

By: William D. Templeton
Deputy-in-Charge

(2) Judgement of United States Court of Appeals for the Second Circuit:

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of November, one thousand nine hundred and seventy-five.

Present:

HON. IRVING R. KAUFMAN
Chief Judge

HON. HENRY J. FRIENDLY

HON. J. JOSEPH SMITH
Circuit Judges,

75-2093

NOWELL BRATHWAITE,
Petitioner-Appellant,

v.

JOHN MANSON, Commissioner of Corrections of the State of Connecticut,
Respondent-Appellee.

Appeal from the United States District Court for the District of Connecticut

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and that the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

A. Daniel Fusaro
Clerk

By Vincent A. Carlin
Chief Deputy Clerk

3. JUDGMENT IN QUESTION

The judgment in question is the judgment of the United States Court of Appeals for the Second Circuit, dated November 20, 1975, which reversed the judgment of the United States District Court for the District of Connecticut and remanded the action to the District Court for further proceedings.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

No. 75-871

JOHN R. MANSON,

Petitioner,

v.

NOWELL A. BRATHWAITE,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

RESPONDENT'S MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

Pursuant to 28 U.S.C. §1915 and Rule 53 of the Rules of this Court, respondent respectfully moves for leave to proceed herein in forma pauperis. Respondent's affidavit in support of this motion has been filed and served contemporaneously with the filing of this motion.

Respectfully submitted,

Frank J. Flegal

FRANK FLEGAL
600 New Jersey Avenue, N.W.
Washington, D.C. 20001

Counsel for Respondent

January 1976

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-871

JOHN R. MANSON,

Petitioner,

v.

NOWELL A. BRATHWAITE,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of
Appeals for the Second Circuit

R E S P O N D E N T ' S A F F I D A V I T

City of Somers, Connecticut: ss

NOWELL BRATHWAITE, being duly sworn, deposes and says:

1. I am the respondent herein, a citizen of the United States, and submit this affidavit in support of my motion for leave to proceed in forma pauperis.

2. I am presently incarcerated at the Connecticut Correctional Institution at Somers, Connecticut.

3. Because I have been incarcerated since 1971, I am without finances to pay or give security for the costs of the printing expenses in this Court.

4. My application for leave to proceed in forma pauperis is solely for the purpose of permitting the filing of my opposition to the petition for writ of certiorari in type-written form, and to permit the printing of briefs in the event the petition for writ of certiorari is granted, and not for the purpose of seeking counsel fees for my attorney.

5. I successfully prosecuted an appeal to the U.S. Court of Appeals for the Second Circuit from an order of the United States District Court in Hartford dismissing my application for a writ of habeas corpus, but the State's Attorneys Office in Hartford County has now filed a petition for writ of certiorari in this Court, thereby making me a respondent in this case. I believe that I am entitled to the redress which I sought from the District Court and the Court of Appeals, and my opposition to the State's Attorneys petition is made in good faith and not for the purpose of delay.

Nowell Brathwaite
NOWELL BRATHWAITE

Subscribed and sworn to before me
this ____ day of January, 1976.

W. J. Hi[illegible]
Notary Public
My commission expires 31 March 1980

75-871

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-871

JOHN R. MANSON, Commissioner of Correction of the State of Connecticut, Petitioner,

v.

NOWELL A. BRATHWAITE, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

FRANK F. FLEGAL
DAVID GOLUB
MARTHA STONE

Attorneys for Respondent

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-871

JOHN R. MANSON, Commissioner of Correction of the State of Connecticut, Petitioner,

v.

NOWELL A. BRATHWAITE, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

I. STATEMENT OF THE CASE.

A. HISTORY OF THE PROCEEDINGS

The respondent Nowell Brathwaite was found guilty of possession and sale of heroin after a jury trial in Connecticut Superior Court in Hartford, Connecticut on January 14, 1971. He was sentenced on February 5, 1971 to a term of imprisonment of not less than six nor more than nine years. Thereafter, he

perfected a timely appeal to the Connecticut Supreme Court, which affirmed his conviction on April 5, 1973. State v. Brathwaite, 164 Conn. 617 (1973).[1]

In May, 1974, Brathwaite filed a petition for a writ of habeas corpus in the United States District Court in Hartford, alleging the erroneous admission of identification testimony at his trial had violated his rights of due process. The petition was dismissed by the district court, Blumenfeld, J., in an unreported written opinion,[2] filed on May 14, 1975, based on the court's review of the trial transcript.

Brathwaite appealed from the district court denial of his petition to the United States Court of Appeals for the Second Circuit, which court, Friendly, J., reversed the district court opinion and ordered the State either to retry or release Brathwaite. Brathwaite v. Manson, 527 F.2d 363 (1975).[3] From this decision, rendered on November 20, 1975, the State has petitioned this Court for a writ of certiorari.

This memorandum is submitted in opposition to the State's petition for a writ of certiorari.

B. STATEMENT OF THE FACTS

On May 5, 1970, at 7:45 p.m., police undercover agent James Glover and his informant Henry Brown went to an apartment building at 201 Westland Avenue, Hartford, Connecticut, [Transcript of Trial, pp. 24, 25], for the purpose of purchasing

narcotics from "Dickie Boy" Cicero, a known narcotics dealer who lived in an apartment on the left side of the third floor [T., p. 45]. Glover and Brown entered the premises, observed by back-up officers Michael D'Onofrio and William Gaffey, but by mistake went to an apartment on the right side of the third floor [T., pp. 26, 85].

Glover and Brown described the ensuing events in the building differently.

Glover testified that he knocked on the apartment door and that in response the door was opened twelve to eighteen inches, revealing an unknown black male and female. Glover then asked the man for two bags of heroin, which the man agreed to sell him [T., p. 29]. The door was closed and remained shut for approximately three minutes, presumably while the heroin was procured in the apartment [T., p. 31]. The door was then reopened and an exchange took place with the same man followed by the door being closed immediately thereafter [Id.] Glover and Brown then departed the building, five to seven minutes after entering [T., p. 33]. There was no artificial light in the hallway, although some natural light came in through the windows that evening [T., p. 28].

Brown testified that the exchange had taken place with a black woman, not with a black man [T., p. 87].

After the transaction was completed, Glover and Brown left the building. At 7:53 p.m., eight minutes after their

initial arrival outside the premises, Glover radioed Gaffey that the transaction had been completed [T., p. 11]. Glover then drove to police headquarters where he gave a description of the seller to D'Onofrio [T., p. 36]. Neither Glover nor D'Onofrio knew the identity of the seller at this time.

That evening D'Onofrio proceeded to the Records Division of the Hartford Police Department and secured one photograph of Brathwaite to show Glover [T., pp. 65, 70]. Although neither Glover nor D'Onofrio knew Brathwaite, and although D'Onofrio was furnished with only a general description of the seller, only one photograph of Brathwaite was selected by D'Onofrio from the extensive police files for viewing by Glover [T., p. 41]. The picture had been taken of Brathwaite in connection with a breach of the peace [T., p. 70].

Two days later, Glover looked at the isolated photograph of Brathwaite and identified Brathwaite as the person from whom he had purchased the heroin [T., p. 38]. No explanation was given for the absence of a full photographic array or line-up proceeding, although D'Onofrio did testify that a photographic show-up[4] is not an unusual procedure [T., p. 71].

At the trial, the only evidence linking Brathwaite to the crime was the photographic identification made by Glover on May 7, 1970, and an in-court identification made by Glover during trial on January 8, 1971. In the eight months between the crime and the trial, Glover had had no occasion to see Brathwaite [T., p. 41].

Brathwaite testified that he had been ill at home on the day in question [T., p. 106]. His wife, Eleanor Mae Brathwaite, confirmed that Brathwaite had in fact remained home that day with her [T., p. 165]. Dr. Wesley Vietzke testified as to Brathwaite's medical condition at the time, corroborating Brathwaite s testimony [T., p. 131].

Brathwaite had immigrated to America in March, 1965, and was a native of Barbados in the British West Indies [T., p. 99]. On May 5, 1970, Brathwaite was suffering from a facial tic [T., pp. 138-39].

II. ARGUMENT.

Although the Second Circuit's interpretation of Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed 2d 401 (1972), in the instant case is in conflict with the holdings of other circuits,[5] and although the rule set forth by the Second Circuit is one supported by the commentators[6] and deserving of this Court's consideration, this case does not present an appropriate vehicle for the next major explication by this Court of the due process standards to be applied to identification law.

The court of appeals' reversal of Brathwaite's conviction was premised on two independent grounds. Not only did the court interpret Neil v. Biggers to be limited to pre-Stovall cases and thus exclude the show-up testimony on a per se basis, but

alternatively it also ruled that even if Neil v. Biggers were applicable to this case, the identification testimony was still erroneously admitted.

The second basis for the court of appeals' reversal is well-supported by the facts of the case[7] and presents no issue worthy of this Court's review. In the absence of review by the Court of this ground, reversal of the court of appeals' holding on the first ground would have no bearing on the outcome of the case, and any decision rendered would, in effect, be no more than an advisory opinion. Under such circumstances, certiorari should not properly be granted. "SS Monrosa" v. Carbon Black Export, Inc., 359 U. S. 180, 184, 3 L.Ed 2d 723, 724, 79 S.Ct. 710, rehearing denied 359 U.S. 999 (1959); Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74, 99 L.Ed 897, 901, 75 S.Ct. 614 (1955). See generally Stern and Gressman, Supreme Court Practice, fourth edition (1969), ch. 4, §4.4, pps. 157-8. "This is especially true where the issues involved reach constitutional dimension, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance become evasion. Cf. the classic rules for such avoidance stated by Mr. Justice Brandeis in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341 80 L.Ed 688, 707, 56 S.Ct. 466 [1936]." Rice v. Sioux City Memorial Park Cemetery, Inc., supra.

The State argues that the Court should review the second ground of the court of appeals' decision as well as the first, because, the State contends, the court of appeals exceeded the proper scope of appellate review when it held, contrary to the district court, that the impermissibly suggestive photographic show-up gave rise to a substantial likelihood of misidentification.

This contention is clearly without merit. No evidentiary hearing was held in the district court. The district court's denial of Brathwaite's petition was based solely on a review of the trial transcript, which transcript was also before the appellate court in full. Thus the district court did not base its conclusion on any findings as to demeanor or credibility of witnesses not also accessible to the court of appeals. Indeed, the court of appeals did no more than assess differently than the district court the constitutional significance of the elemental facts presented by the trial transcript, much as this Court did in its reversal of the lower courts in Neil v. Biggers. Neil v. Biggers, supra, at 193, n.3.

The court of appeals clearly acted properly in reviewing the district court's conclusions from the trial transcript, and review by this Court of the court of appeals' action is not warranted to resolve any legitimate issue of appellate procedure, nor necessary to correct any substantive error.

Since the instant case now represents the law in the Second Circuit, it is inevitable that the Court will soon be faced with a decision from that circuit raising solely the issue posed by the limited application of Neil v. Biggers adopted in this case. In the interim, future decisions from the Second Circuit will no doubt analyze and refine[8] the opinion herein, thus providing this Court with a fuller discussion of the bases and reasoning underlying the Second Circuit's holding. Not insignificantly, the Court will, in the future, also be able to observe the impact of the rule adopted in the court below on law enforcement and judicial review of identification issues.

III. CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari be denied.

THE RESPONDENT

NOWELL A. BRATHWAITE

By Frank F. Flegal
Frank F. Flegal
David S. Golub
Martha Stone
Attorneys for Respondent

NOTES

1. See Petitioner's Petition for Writ of Certiorari, at p. 1a.

2. Id., at 5a.

3. Id., at 12a

4. The phrase "photographic show-up" shall be used to describe an identification procedure in which an individual is shown only one photograph and asked to make an identification therefrom.

5. See United States ex rel. Kirby v. Sturges, 510 F.2d 397 (7th Cir.), cert. den. U.S. , 95 S.Ct. 2424 (1975); Nassar v. Vinzant, 519 F.2d 798 (1st. Cir. 1975); Holland v. Perini, 512 F.2d 99 (6th Cir. 1975); compare Smith v. Coiner, 473 F.2d 877 (4th Cir.), cert. den. sub nom. Wallace v. Smith, 414 U.S. 1115 (1973), with Stanley v. Cox 486 F.2d 48 (4th Cir.), cert. den. 416 U.S. 958 (1973).

6. As Justice Stevens, while sitting as a circuit judge, has pointed out, "There is a suprising unanimity among scholars in regarding such a rule as essential to avoid serious risks of miscarriage of justice." United States ex rel Kirby v. Sturges, supra, at 405. See Grano, "Kirby, Biggers and Ash: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?" 72 Mich.L.Rev. 717, 782-783 (1974); "Recent Developments, Identification: Unnecessary Suggestiveness May Not Violate Due Process." 73 Colum.L.Rev. 1168, 1180 (1973); Note, "Pretrial Identification Procedures--Wade to Gilbert to Stovall: Lower Courts Bobble the Ball." 55 Minn.L.Rev. 779, 794 (1971).

Model Code of Pre-Arrangement Procedure Sections 160.1, 160.2 (Tent. Draft No. 6, 1974). See also Model Rules for Law Enforcement: Eyewitness Identification, Project on Law Enforcement Policy and Rulemaking,

College of Law, Arizona State University, Section 2, (1972), reprinted in Model Code of Pre-Arraignment Procedure, App. VII (Tent. Draft No. 6. 1974).

7. Glover had a very limited opportunity to observe the seller. His only glimpse of the seller came during the two short intervals the door was opened. The door was opened only twelve to eighteen inches [T., p.29], and there was no electric or other artificial lighting in the hallway [T., p. 28] or apartment. Although there was natural light in the hallway, the transaction took at sunset that evening.

Most important, the trial transcript reveals that Glover had, at the most, a matter of a few seconds to observe the seller.

Glover and Brown arrived outside the building at 7:45 p.m. [T., p. 10]. At 7:53 p.m., eight minutes later, Glover and Brown were again outside the building, having completed the transaction and radioing to Gaffey from Glover's car [Id.] D'Onofrio testified that "only three or four minutes" elapsed from the time they had climbed up and down three flights of stairs. Glover testified that he waited at the closed apartment door for approximately three minutes while the seller procured the heroin in the apartment [T., p. 31].

The door was opened the first time only long enough for three short sentences to be spoken [T., p. 30, 31]. The second time the door remained open only long enough for the exchange to occur and was then immediately closed [T., p. 32].

Glover therefore caught only a quick glimpse of the person with whom he conducted the sale, under circumstances of poor lighting and limited view.

Glover's description of the seller was, as the court of appeals noted, easily applicable to hundreds of black males in the Hartford area, and failed to mention anything unusual about Brathwaite's facial appearance or foreign characteristics or accent. Furthermore, Glover waited two days before attempting to make a photographic identification and another eight months before making a physical identification.

8. In this regard, it is possible that the Second Circuit might limit the holding below to cases involving photographic show-ups. The viewing of a single photograph has quite properly been called "the most suggestive and therefore the most objectionable method of pretrial identification," Kimbrough v. Cox, 444 F.2d 8, 10 (4th Cir. 1971), and this Court has expressly criticized such a practice. Simmons v. United States, 390 U.S. 377, 383 (1968). It is possible to construe the opinion below as holding only that the degree of suggestiveness inherent to photographic show-ups makes a substantial likelihood of

misidentification inevitable and therefore does not require a fuller examination of the Neil v. Biggers totality of the circumstances.

Furthermore, because it is conceivable that different standards might well be imposed with respect to photographic identification procedures as opposed to physical identification procedures, resolution of the issue left open in Neil v. Biggers should properly await a case involving impermissibly suggestive physical identification procedures.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-871

JOHN R. MANSON, COMMISSIONER OF CORRECTION
OF THE STATE OF CONNECTICUT,

Petitioner,

—v.—

NOWELL A. BRATHWAITE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

GEORGE D. STOUGHTON
State's Attorney
BERNARD D. GAFFNEY
Assistant State's Attorney
95 Washington Street
Hartford, Connecticut 06106

Attorneys for Petitioner

TABLE OF CONTENTS

CITATIONS AND AUTHORITIES

Cases:

Statute:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-871

JOHN R. MANSON, COMMISSIONER OF CORRECTION
OF THE STATE OF CONNECTICUT,

Petitioner,

—v.—

NOWELL A. BRATHWAITE,

Respondent.

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the Supreme Court of the State of Connecticut is reported, sub nomine, *State* v. *Brathwaite,* 164 Conn. 617, 325 A. 2d 284 (1973) (App. p. 7a).

The opinion of the United States Court of Appeals for the Second Circuit is reported, sub nomine, *Brathwaite* v. *Manson,* 527 F.2d 363 (1975) (App. p. 7a).

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on November 20, 1975 (App. pp. 9a, 10a). The petition for a writ of certiorari was filed on December 20, 1975, and was granted on May 3, 1976. The jurisdiction of this Court rests upon 28 U.S.C., Sec. 1254(1).

Constitutional Provisions Involved

Petitioner maintains that the Court of Appeals, in reversing the judgment of the District Court, erred in concluding that in the conduct of his criminal trial in the State court the Respondent's rights under the Fifth and Fourteenth Amendments to the United States Constitution were violated.

Questions Presented

1. Did the Court of Appeals err in concluding that evidence of an impermissibly suggestive and unnecessary out-of-court photographic identification received during the Respondent's criminal trial renders his conviction constitutionally invalid, notwithstanding the receipt of other reliable evidence during the trial serving as a valid basis for an in-court identification by the same identifying witness?

2. Did the Court of Appeals, in reversing the decision of the District Court, err in substituting its judgment of the facts for that of the trial court jury in reaching the conclusion that for other reasons the conviction should not stand?

Statement of the Case

On May 5, 1970, at about 7:45 P.M., Jimmy D. Glover, a black undercover State Police Officer, and an informant went to a third floor apartment at No. 201 Westland Street, Hartford, Connecticut, to purchase narcotics from a suspected seller. Trial Transcript pp. 23-25. After he knocked, the door opened twelve to eighteen inches and Glover observed a black male standing in front of a female just inside the apartment. Tr. pp. 28, 29. It was not dark at the time, there was natural light coming from the

outside through the windows, and Glover "had no problem seeing at all in the hallway." Tr. pp. 27, 28. After the informant identified himself, Glover asked the male for some narcotics. This person then asked Glover to repeat his request. Glover did so, and the person then held out his hand and Glover gave him two $10 bills. The door which had remained open for two to three minutes then closed. After a few moments the door reopened, and the same male person placed two glassine bags containing heroin from his hand into Glover's hand before the door closed again. Tr. pp. 29-31, 73, 74. During the entire period the door was open Glover stood within two feet of the person from whom he had made the purchase while looking at his face. Five to seven minutes elapsed from the time the door first opened until it closed the second time. Tr. pp. 30-33. During the time of the sale Detective Michael D'Onofrio of the Hartford Police Department was stationed outside the building acting as a covering officer for Glover. Tr. pp. 58-60. Later the same evening Glover, who did not know his seller by name, described him to D'Onofrio as being a dark-complexioned black male, approximately five feet eleven inches tall, heavy build, black hair in an Afro style, with high cheekbones wearing blue pants and a plaid shirt. Tr. pp. 36, 37. D'Onofrio recognized the description given as that of Nowell Brathwaite whom he had seen on several prior occasions and whom he knew by sight. He then obtained a photograph of Brathwaite from the records division of the Hartford Police Department and dropped the photograph off at State Police Headquarters. Tr. pp. 63-65. On May 7, while at Headquarters, Glover viewed the photograph for the first time and identified the person shown as the same person from whom he had purchased the narcotics. Tr. pp. 36-38.

The toxicological report confirming the presence of heroin in the glassine bags purchased by Glover was prepared on July 16, 1970. Tr. p. 75.

Brathwaite was placed under arrest on July 27, 1970, while visiting a Mrs. Ramsey at her apartment on the third floor of No. 201 Westland Street, Hartford. Mrs. Ramsey was a friend of Brathwaite's wife, and he admitted that he had visited at the apartment "lots of times" prior to the date of the offense. The apartment was the same one at which the narcotics sale had taken place. Tr. pp. 112, 113, 121, 122, 176.

On January 8, 1971, during the trial of the case, the photograph from which Glover had identified Brathwaite was received in evidence without objection. Glover, who had not seen Brathwaite since the date of the sale, testified unequivocally ("There is no question whatsoever") that the person shown in the photograph was the same person from whom he had made the purchase. Glover, also without objection, made a positive in-court identification. Tr. 37, 38.

The Respondent was found guilty by a jury of twelve of both counts of a criminal information charging him with illegal sale and possession of narcotics. His conviction was affirmed by the Connecticut Supreme Court and he is in custody pursuant to the sentence imposed by the State trial court.

Summary of Argument

1. The case of *Stovall* v. *Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), affirmed the right of a convicted accused to attack his conviction when evidence was received of a suggestive and unnecessary identification procedure. It did not establish a strict exclusionary rule, and the mere fact that evidence of a showup was received during a criminal trial does not mean that a fair trial was not afforded or that a due process violation occurred. What is of critical importance is the reliability of the

identification testimony under all of the circumstances of the case. In its decision in the case of *Neil* v. *Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), this Court enunciated the various indicia of reliability which our courts should consider in weighing the impact upon the trier of suggestive and unnecessary identification evidence. Applying the *Biggers'* standards to the instant case, the identification evidence under the totality of the surrounding circumstances is reliable and the decision of the Court of Appeals should be reversed.

2. The Court of appeals ruled that even if it were wrong and the *Neil* v. *Biggers* standards were intended to apply to post-*Stovall* showups, for other reasons the Respondent's conviction should be set aside. In reaching its conclusion the Court has erroneously substituted its judgment for that of the trier of the fact in the State court and the reviewing judge in the federal district court. In so doing it has decided issues of motive as well as the reliability and credibility of testimony and, contrary to the accepted standard [*Glassner* v. *United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942)], it has examined the evidence in a light which least supports the result reached by the trier.

ARGUMENT

I

The Respondent's conviction following the receipt of evidence of a suggestive and unnecessary identification procedure did not violate his right to due process where other reliable identification testimony was also received.

The Court of Appeals in the instant case, in concluding that the photographic identification was impermissibly and unnecessarily suggestive, has held that the Respond-

ent's conviction in the trial court was obtained in violation of due process standards:

> "Prior to *Neil* v. *Biggers,* supra, this alone would have permitted a speedy resolution of the case. This court and others had held that, except in cases of harmless error, a conviction secured as the result of admitting an identification obtained by impermissibly suggestive and unnecessary measures could not stand, see, e.g., *United States* v. *Fernandez,* 456 F.2d 638, 641-42 (2 Cir. 1972); *Kimbrough* v. *Cox,* 444 F.2d 8 (4 Cir. 1971); *United States* v. *Fowler,* 439 F.2d 133 (9 Cir. 1971); *Mason* v. *United States,* 414 F.2d 1176 (D.C. Cir. 1969), although, following the lead of *United States* v. *Wade,* 388 U.S. 218, 239-40 (1967), we allowed the prosecution to by-pass the tainted identification and introduce subsequent identifications or have the witness make an in-court identification if satisfied that these stemmed from the original observation of the defendant rather than the tainted identification. *United States ex rel. Phipps* v. *Follette,* 428 F.2d 912 (2 Cir. 1970) cert. denied, 400 U.S. 908 (1970); *United States ex rel. Gonzalez* v. *Zelker,* supra, 477 F.2d at 801-05. Here there would have been no occasion to consider whether Glover's in-court identification rested on his original observation (except for the bearing of this on a new trial) since the admission of the photographic identification would have been fatal constitutional error."
>
> *Brathwaite* v. *Manson,* 527 F.2d 363, 367 (1975) (2 CCA).

The Appeals Court reaches its decision by construing a passage from *Neil* v. *Biggers,* 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), to mean that the standards for reliability of identification evidence enunciated in that decision have application only to pre-*Stovall* (*Stovall* v.

Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967)) cases with the strict exclusionary rule applying to those cases which post-date *Stovall* such as the present one:

> "Such a rule would have no place in the present case since both the confrontation and the trial preceded *Stovall* v. *Denno,* supra, when we first gave notice that the suggestiveness of confrontation procedures was anything other than a matter to be argued to the jury." 409 U.S. at 199.

What the Court of Appeals has said in rather specific language is that "[a]lthough the commentators differ concerning the meaning of this passage (footnote omitted) [the Court believes] that, at minimum, it preserves, in cases where both the confrontation and the trial were subsequent to *Stovall,* the principle requiring the exclusion of identifications resulting from 'unnecessarily suggestive confrontation'."

Brathwaite v. *Manson,* supra, 368.

This Court has long recognized the right of a convicted accused to attack his conviction when the criminal proceedings by which it was obtained offended the "canons of decency and fairness' and thereby deprived him of due process of law.

> *Malinski* v. *New York,* 324 U.S. 401, 416-417, 65 S.Ct. 781, 89 L.Ed. 1029 (1944).

More recently in *Stovall* the Court affirmed the right of a convicted accused to attack his conviction when during his trial evidence was received of an unnecessary and suggestive identification procedure. To permit a conviction without more to stand on such a foundation is clearly a violation of due process of law.

Stovall v. *Denno, supra,* 301-302.

The Court has told us in rather plain language why it is that suggestive confrontations are condemned:

> "Suggestive confrontations are disapproved because they increase the likelihood of misidentification and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous."
>
> *Neil* v. *Biggers,* supra, 198.

The principal concern from the standpoint of due process is that the admission of evidence of the confrontation may infringe upon the accused's constitutional right to a fair trial. This is most certain to occur when the State *relies* in its prosecution upon identification evidence which is "secured by a process in which the search for truth is made secondary to the quest for a conviction." *Palmer* v. *Peyton,* 359 F.2d 199, 202 (1966) (4 CCA).

The mere fact that a showup or suggestive confrontation has occurred, however, does not in and of itself violate any due process standard. If a violation occurs, it is when evidence of the defective procedure comes into the trial and, as a result thereof, a conviction is obtained.

> "Unlike a warrantless search, which may violate a constitutionally protected interest in privacy the identification of a suspect—whether fair or unfair—does not necessarily affect any constitutionally protected interest of the suspect. The due process clause applies only to proceedings which result in a deprivation of life, liberty or property. The due process issue does not arise until testimony about the showup—or perhaps obtained as a result of the showup—is offered at the criminal trial."
>
> *United States ex rel. Kirby* v. *Sturges,* 510 F.2d 397, 406 (1975) (7 CCA), cert. den. 421 U.S. 1016, 95 S.Ct. 2424, 44 L.Ed.2d 685.

But it does not follow, from the mere fact that such evidence is heard by the trier, that a fair trial has been denied. *Stovall* itself, in its reference to the totality of circumstances, did not establish a strict exclusionary rule or a new standard of due process. What the Court did in *Stovall* was to affirm the right to attack one's conviction ("This is a recognized ground of attack upon a conviction independent of any right to counsel claim" at p. 302), when it is based solely or largely on such tainted evidence. In short, *Stovall* reaffirmed the existence of an evidentiary right of due process which an accused person enjoys:

> "In essence what the *Stovall* due process right protects is an evidentiary interest. . . . It is part of our adversary system that we accept at trial much evidence that has strong elements of untrustworthiness—an obvious example being the testimony of witnesses with a bias. While identification testimony is significant evidence, such testimony is still only evidence, and, unlike the presence of counsel, is not a factor that goes to the very heart—the 'integrity'—of the adversary process. Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification—including reference to both any suggestibility in the identification procedure and any countervailing testimony such as alibi."
>
> *Clemons* v. *United States,* 408 F.2d 1230, 1251, 133 App. D.C. 27 (1968), concurring opinion, Leventhal, J.

Whether a claimed violation of due process of law has in fact occurred can only be determined by an examination of all of the surrounding circumstances.

> *Stovall* v. *Denno,* supra, 302.
>
> "The mere fact that some 'unreliable' identification testimony was received does not establish a denial of

the due process right to a fair trial. That right is to be tested by assessing the totality of proof on the identification issue."

Clemons v. *United States,* supra, 1250-1251.

If the procedure is so aggravated and extreme that in effect the witness is all but compelled to identify the suspect, that alone will control and dictate that a violation has occurred.

Foster v. *California,* 394 U.S. 440, 443, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969).

Such is not true in the present case. Officer Glover, the identifying witness, was a trained police officer, and Detective D'Onofrio, who obtained the single photograph, recognized the Respondent from the description which Glover had given. D'Onofrio, who was acquainted with Brathwaite from having observed him on prior occasions in the same neighborhood, was not present when Glover viewed the single photo as it lay on his desk and exerted no pressure on Glover to make an identification.

It follows then that, although the procedure in the instant case was suggestive and unnecessary as well since it could have been avoided, the suggestiveness was not so extreme or pronounced under all of the circumstances as to make it inevitable that Glover would identify whomever appeared in the photograph. Indeed, one must strain to full capacity to adopt the Appeal Court's reasoning that Glover, by virtue of some moral obligation or professional courtesy, felt compelled to endorse D'onofrio's conclusion. *Brathwaite* v. *Manson,* supra, 367 Fn. 5.

Conceding, as the Petitioner does, the inherent suggestiveness and lack of necessity which pervaded the identification procedure, evidence of this at trial would not require a reversal of the Respondent's conviction for the reason that it does not automatically follow that his due

process rights were violated. On the contrary, this Court has suggested with some frequency that its chief concern is with the reliability of the identification evidence as a whole. This was most clearly demonstrated in *Coleman* v. *Alabama,* 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970), where the Court endorsed the overall reliability of the identification evidence despite evidence of some questionable identification procedures used by the police.

The same principle (i.e., an assessment of the reliability of the identification evidence under all of the circumstances of the case) was earlier applied in a case, such as the instant one, which relied in part on identification by photograph:

"Taken together, these circumstances leave little room for doubt that the identification of Simmons was correct, even though the identification procedure employed may have in some respects fallen short of the ideal (footnote omitted). We hold that in the factual surroundings of this case the identification procedure used was not such as to deny Simmons due process of law or to call for reversals under our supervisory authority."

Simmons v. *United States,* 390 U.S. 377, 385-386, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968).

Later this Court, in holding that "as Stovall makes clear, the admission of evidence of a showup without more does not violate due process" (p. 198), defined the indicia of reliability:

"We turn, then, to the central question, whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive. As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness'

degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation."

Neil v. *Biggers,* supra, 199.

An application of the *Biggers'* guidelines to the facts and circumstances of the instant case leads forcefully to the conclusion that Glover's identification of Brathwaite was sufficiently reliable to avoid a due process violation:

1. *Opportunity to view the subject at the time of the crime.*

   Glover testified that for a period of not less than two to three minutes he stood within two feet of Brathwaite while looking at his face at the threshold to his apartment. Glover stated that during this period there was light both in the hallway and inside the apartment, and he had no difficulty at any time in seeing his seller.

2. *Degree of attention.*

   It is significant that Glover was not a mere casual observer, unaware or disinterested in what was occurring. Rather, he was a trained police officer on an undercover narcotics assignment. His contact with Brathwaite was for the purpose of exposing him as a narcotics dealer, and he was careful to form in his mind a definite image of the person with whom he was transacting the sale.

3. *Accuracy of the description.*

   Glover's description of his seller as given to Detective D'Onofrio minutes after the transaction was of a black male, five feet eleven inches tall, heavy build,

black hair in an Afro style, with high cheekbones. He was also able to describe some of the clothing worn. To say the least, the description is a rather detailed one, and, notwithstanding the deficiencies in the procedure, "its reliability", as the District Court points out, "is supported by the fact that it allowed D'Onofrio to pick out a single photograph that was thereafter positively identified by Glover." (App. p. 7a). Its accuracy may also be inferred from the fact that neither Brathwaite nor his wife, both of whom testified at trial, made any claim that his physical characteristics were unlike those described.

4. *Level of certainty.*

   Regardless of any flaw in the photo identification procedure there is no dispute that the photograph received in evidence during the trial was of the Respondent. The degree of Glover's certainty in identifying him as the seller is best illustrated by his testimony:

   "Q. And there is no question, then, I take it, that the photograph is of the person from whom you made the buy, is that what you said? A. There is no question whatsoever.

   Q. And that would be the person identified as the accused in this case sitting at the counsel table? A. Yes, it would be." Tr. p. 38.

And later:

"Q. Have you had occasion to see this accused since that date, since May 5th? A. No, I have not.

Q. You hadn't seen him before. A. No, I had not

Q. I think you said there is no doubt whatsoever in your mind that this is the same person from whom you made the purchase? A. No, there isn't." Tr. pp. 41-42.

5. *Length of time between crime and confrontation.*

Only a matter of minutes elapsed between the crime and Glover's description of his seller to Detective D'Onofrio. Thereafter no more than two days passed before Glover's photographic identification. Although there was an interval of eight months between the date of the offense and Glover's in-court identification, the period of time is not so significant as to lead to a conclusion that the recollection of the witness, a trained police officer, would have been affected.

If "*Stovall* makes clear", as *Biggers* has told us, "[that] the admission of evidence of a showup without more does not violate due process" (409 U.S. at 198), why should the rule be any different as to cases which arose after June 12, 1967? Accepting, as the Court has said (p. 199), that the "central question" is really one of reliability under all of the circumstances, and recognizing that no two cases present exactly the same fact pattern, it is for the trial and appellate courts to assess the impact of the showup evidence in ruling on the effect of its admissibility and the admissibility of other evidence which may have been derived from the showup. Judge McGowan of the District of Columbia Circuit expressed it clearly when he said:

> ". . . [T]he resolution of due process claims, both past and future, remains for us, as it was for the Supreme Court in *Stovall*, *Simmons*, and *Biggers*, an inescapable duty. That affirmances were the result in all those cases may or may not be significant, but in any event, we think the Court has formulated a broad standard of review which focuses upon the distinctive facts of each case in their totality, and which relies very heavily upon the special capacity of judges, trial and appellate, to discriminate between real and fancied dangers of the miscarriage of justice."
>
> *Clemons* v. *United States*, supra, 1237.

Certainly an appropriate cautionary instruction by the trial court can achieve much toward alerting a jury to the dangers of a miscarriage; *United States* v. *Barber*, 442 F.2d 517, 528 (1971) (3 CCA); while at the same time avoiding the absurd results which a strict exclusionary rule can produce:

> ". . . [T]here are obviously many situations in which there is no unfairness at all in the admission of showup testimony. If, for example, the victim of a violent crime informed the police that his assailant was his brother, or perhaps a close friend of many years, it would be absurd to criticize the police for having the victim identify a suspect in a one-to-one confrontation. The range of variation—from no unfairness at one extreme, through situations in which the jury can be safely relied upon to recognize the suggestive factors and discount the reliability of the identification to the other extreme in which wholly unreliable evidence is nevertheless so persuasive that fundamental fairness requires that it be excluded—is itself a persuasive reason for not concluding that an inflexible exclusionary rule is mandated by the Constitution."
>
> *United States ex rel. Kirby* v. *Sturges*, supra, 408.

Moreover, if it is the police and their use of unfair and inept identification procedures which are to be deterred (as *Biggers* tells us, pp. 198-199), then it is a problem which in the first instance the legislatures of the several states should deal with. As for the present case, no due process violation occurred in the trial court, the identification evidence under all of the circumstances was reliable, and the Appeal Court's decision should be reversed.

II

The Court of Appeals erred in substituting its judgment as to factual issues for that of the trial court jury and the reviewing federal court judge thereby permitting it to conclude that for other reasons the Respondent's conviction should not stand.

In what might be described as a contingency opinion:

> "Even if we should be wrong in all of this and *Neil* v. *Biggers* was intended to apply the *Simmons* test to post-*Stovall* showups or photographic displays that were impermissibly and unnecessarily suggestive, as well as to in-court identifications following upon them, the writ should issue here."
>
> *Brathwaite* v. *Manson*, supra, 371—

The Court of Appeals has ruled in effect that the jury should have found the Respondent not guilty. The Court reached this conclusion by deciding that Officer Glover's testimony that natural light was present in the hallway at the time of the sale and his unequivocal in-court identification were not credible. Even more significantly the Court has decided that Glover was not a reliable witness to begin with:

> "The certainty of identification is far less persuasive when the expressions come from the lips of an undercover agent . . . than when they are the words of an ordinary citizen, whether a bystander or a victim." Id.

By the same token, the Court has attached plausibility to Brathwaite's explanation of his presence at the time of his arrest in the very apartment from which the sale had taken place ("But Brathwaite offered an explanation of this which was not implausible . . ." p. 372); and at the same

time has explained away the significance of this by implying that the location of the arrest was all part of a set-up which the police had contrived, presumably to strengthen their case against Brathwaite (". . .Brathwaite was . . . arrested when he was known to be in Mrs. Ramsey's apartment . . ." p. 372). It may be of interest to note that at no time during the trial of the case was any such claim even remotely raised by the defense.

The review of the Court of Appeals was the narrow and limited one of due process, and whether it was violated in the State trial court.

> *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974);
> See also *Cupp* v. *Naughten*, 414 U.S. 141, 146, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973).

It was not the function of the Appeals Court, the due process issue aside, to weigh and speculate about the reliability of witnesses and the credibility of testimony, matters which the twelve jurors were in a far superior position to evaluate:

> "It is not for this Court, any more than for a Federal District Court, in habeas corpus proceedings, to make an independent appraisal of the legal significance of facts gleaned from the record after such a conviction. We are barred from speculating—it would be an irrational process—about the weight attributed to the impermissible consideration of truth and falsity which, entering into the Connecticut trial court's deliberations concerning the admissibility of the confessions, may well have distorted, by putting in improper perspective, even its findings of historical fact. Any consideration of this 'reliability' element was constitutionally precluded, precisely because the force which it carried with the trial judge cannot be known."
>
> *Rogers* v. *Richmond*, 365 U.S. 534, 545, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961).

Likewise, the mere fact that the evidence might lead to conflicting inferences and interpretations is not a valid basis for the Appeal Court's reversal.

> *Texas & New Orleans Railroad Company* v. *Railway & Steamship Clerks,* 281 U.S. 548, 559-560, 50 S.Ct. 427, 74 L.Ed. 1034 (1930);

See also:

> *United States* v. *Yellow Cab Co.,* 338 U.S. 338, 342, 70 S.Ct. 177, 94 L.Ed. 150 (1949).

On the contrary, the Court of Appeals, choosing as it did to examine the evidence, should have done so in the light which would most favorably support the jury's verdict.

> *Hamling* v. *United States,* 418 U.S. 87, 124, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974);
> *Glassner* v. *United States,* 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942);
> *United States* v. *Merolla,* 523 F.2d 51, 53 (1975) (2 CCA).

The Petitioner respectfully submits that had it done so the decision of the District Court dismissing the petition would have been affirmed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals for the Second Circuit should be reversed and the Respondent's application dismissed.

Respectfully submitted,

Petitioner

By George D. Stoughton
State's Attorney
Bernard D. Gaffney
Assistant State's Attorney

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-871

JOHN R. MANSON, Commissioner of Correction of the State of Connecticut,

Petitioner,

v.

NOWELL A. BRATHWAITE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

DAVID S. GOLUB
733 Summer Street
Stamford, Connecticut 06905

MARTHA STONE
412 Fifth Street, N.W.
Washington, D.C. 20001

Attorneys for Respondent

Of Counsel:

FREDERICK H. WEISBERG
Public Defender Service
601 Indiana Avenue, N.W.
Washington, D.C. 20004

RICHARD A. SILVER
JAY H. SANDAK
733 Summer Street
Stamford, Connecticut 06905

Washington, D.C. ECLB PUBLISHERS • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-871

JOHN R. MANSON, Commissioner of Correction of the State of Connecticut,

Petitioner,

v.

NOWELL A. BRATHWAITE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Whether evidence of an unnecessarily suggestive out-of-court confrontation is subject to a strict rule of exclusion at trial.

2. Whether the court of appeals exceeded the proper scope of appellate review in holding that the photographic identification procedure used to obtain an identification of respondent gave rise to a substantial likelihood of mistaken identification.

STATEMENT OF THE CASE

A. HISTORY OF THE PROCEEDINGS.

After a jury trial in Connecticut Superior Court in Hartford, Connecticut, respondent Nowell Brathwaite was found guilty, on January 14, 1971, of possession and sale of heroin, in violation of §19-481a and §19-480a, Connecticut General Statutes (Rev. of 1958, as amended 1969), and was sentenced on February 5, 1971 to a term of imprisonment of not less than six nor more than nine years. Respondent's conviction was affirmed by the Connecticut Supreme Court on April 5, 1973. *State* v. *Brathwaite*, 164 Conn. 617, 325 A.2d 284 (1973) [Pet. App. pp. 1a-4a].

On June 28, 1974, respondent filed a petition for a writ of habeas corpus in the United States District Court in Hartford, alleging that the erroneous admission of identification testimony at his trial had violated his right to due process of law. The petition was dismissed by the district court, Blumenfeld, J., in an unreported written opinion [*Memorandum of Decision*, Pet. App. pp. 5a-11a], filed on May 13, 1975, based on the court's review of the trial transcript.[1]

Respondent appealed to the United States Court of Appeals for the Second Circuit, which court, Friendly, J., reversed the judgment of the district court and ordered the State either to retry or release respondent. *Brathwaite* v. *Manson*, 527 F.2d 363 (2d Cir. 1975) [Pet. App. pp. 12a-27a].

[1] Neither party to this action requested an evidentiary hearing in the district court on respondent's claims. *See* Mem. of Dec., *supra*, at 8a n.10.

From this decision, rendered on November 20, 1975, petitioner applied to this Court for a writ of certiorari. On May 3, 1976, certiorari was granted. *Manson* v. *Brathwaite*, ____ U.S. ____, 96 S. Ct. 1737 (1976).

B. STATEMENT OF THE FACTS.

On May 5, 1970, at 7:45 p.m., police undercover agent James Glover and his informant Henry Brown went to an apartment building at 201 Westland Avenue, Hartford, Connecticut [T. 24, 25],* for the purpose of purchasing narcotics from "Dickie Boy" Cicero, a known narcotics dealer who lived in an apartment on the left side of the third floor [T. 45, 68]. Glover and Brown entered the premises, observed by back-up officers Michael D'Onofrio and William Gaffey, but by mistake went to the wrong apartment, knocking on the door on the right side of the third floor [T. 26, 55].

Glover and Brown described the ensuing events in the building differently.

Glover testified that in response to his knock, the door was opened twelve to eighteen inches, revealing an unknown black male and female [T. 29]. Glover asked the man for two bags of heroin, which the man agreed to sell him [T. 29-30]. The door was closed and remained shut for approximately three minutes [T. 31], presumably while the heroin was prepared for sale in the apartment [T. 30]. The door was then reopened, and an exchange took place with the same man [T. 32]. The door was closed immediately thereafter

*References denoted by "[T.]" are to the state trial transcript, on file as part of the Record before this Court.

[*Id.*]. Glover and Brown then departed the building [*Id.*], three or four minutes after entering [T. 60]. There was no artificial light in the hallway or the apartment, although some natural light came in through the windows that evening [T. 28, 33].

Brown testified that the exchange had taken place with a black woman, not with a black man [T. 87].

After the transaction was completed, Glover and Brown left the building. At 7:53 p.m., eight minutes after their initial arrival outside the premises, Glover radioed Gaffey that the transaction had been completed [T. 11]. Glover then drove to police headquarters where he gave a description of the seller to D'Onofrio [T. 36]. Glover did not know the identity of the seller at this time [*Id.*].

That evening, D'Onofrio proceeded to the Records Division of the Hartford Police Department [T. 63]. Suspecting that Brathwaite might be the seller, D'Onofrio secured one photograph of Brathwaite to show to Glover [T. 63, 65, 70]. Although neither Glover nor D'Onofrio knew Brathwaite personally [T. 36, 63], and although D'Onofrio was furnished with only a general description of the seller [T. 36], only one photograph of Brathwaite was selected by D'Onofrio from the extensive police files for viewing by Glover [T. 63, 65]. The picture had been taken of Brathwaite in connection with a breach of the peace charge [T. 70].

Two days later, Glover looked at the isolated photograph of Brathwaite and identified Brathwaite as the person from whom he had purchased the heroin [T. 38]. No explanation was given for the failure to utilize a full photographic array or conduct a line-up proceeding, although D'Onofrio did testify that a

photographic show-up[2] is not an unusual procedure [T. 70-71].

At trial, the only evidence linking Brathwaite to the crime was the photographic identification made by Glover on May 7, 1970, and an in-court identification made by Glover during trial on January 8, 1971 [T. 33, 38; *See Mem.* of *Dec.*, *supra*, at Pet. App. 6a]. In the eight months between the crime and the trial, Glover had not seen the seller again in person [T. 41]. Prior to testifying, Glover had again viewed Brathwaite's isolated photograph.[3]

Brathwaite testified that he had been ill at his apartment on Albany Avenue, Hartford on the day in question and at no time that day had been at 201 Westland Avenue [T. 106]. His wife, Eleanor Mae Brathwaite, confirmed that Brathwaite had in fact remained home that day with her [T. 165]. Dr. Wesley Vietzke testified as to Brathwaite's medical condition at the time, corroborating Brathwaite's testimony [T. 131].

Brathwaite had immigrated to America in March 1965, and was a native of Barbados in the British West Indies [T. 99]. On May 5, 1970, Brathwaite was suffering from a facial tic [T. 138-39].

---

[2] The phrase "photographic show-up" shall be used to describe an identification proceeding in which an individual is shown one photograph or photographs of only one suspect and is asked to make an identification therefrom.

[3] Although the trial transcript does not reflect this second viewing, petitioner's counsel, who was also counsel for the State at trial, admitted at oral argument in the court of appeals that Glover had again viewed respondent's photograph prior to testifying.

SUMMARY OF THE ARGUMENT

A

A strict rule of exclusion of out-of-court identification evidence derived from unnecessarily and impermissibly suggestive post-*Stovall* confrontations is constitutionally mandated, without regard to the reliability of such evidence, in order to safeguard the Fifth and Fourteenth Amendment right to a fair trial.

The primary purpose of the rule is deterrence of improper identification procedures. The rule also minimizes the risk that unreliable out-of-court identification evidence obtained as a result of suggestive procedures will be mistakenly and improperly presented to the fact-finder.

Although a strict rule will, on occasion, require exclusion of reliable identification evidence, such exclusion does not significantly impede the effective prosecution of guilty defendants. Unlike tangible evidence, excluded identification evidence can be easily replaced by other out-of-court confrontation evidence and/or an in-court identification, with little, if any, dimunition in the probative force of a prosecution. If the original identification was "reliable" in spite of the suggestive procedures used to obtain it, then an independent basis will always exist to validate admission at trial of the subsequent identification evidence.

Because the benefits of a strict rule significantly outweigh its costs, the court of appeals was correct in holding that such a rule is required to protect the due process right to a fair trial. The admission at respondent's trial of evidence of an unnecessarily suggestive confrontation was, therefore, error, requiring reversal of respondent's conviction.

B

The court of appeals did not exceed the proper scope of appellate review in holding, as an alternative basis for reversing respondent's conviction, that respondent's rights under the due process clause were violated by the admission at trial of unreliable identification testimony. Resolution of respondent's claims did not turn on factual determinations by the district court or the state trier of fact, but rather required assessment of the constitutional significance of established facts. Although the court of appeals disagreed with the district court's legal conclusion, it did not overturn any factual finding by the district court.

The court of appeals' conclusion that the photographic identification procedure employed gave rise to a substantial likelihood of misidentification was compelled by a proper application of the "totality" test to the facts of this case. The use of one photograph to obtain an identification is widely recognized to be extremely suggestive and was, in this case, wholly unjustified. The likelihood of misidentification as a result of this suggestiveness was especially great since the undercover agent had a limited opportunity, under poor lighting conditions, to observe the seller, and the agent's identification of respondent was not supported by other indicia of reliability.

Since respondent's conviction was based solely on the agent's identification testimony, and since, under the totality of the circumstances, a substantial likelihood of misidentification resulted from the photographic identification procedure employed, the court of appeals correctly held that admission of the identification testimony violated respondent's due process rights, requiring reversal of his conviction.

ARGUMENT

A. THE ADMISSION AT RESPONDENT'S TRIAL OF OUT-OF-COURT IDENTIFICATION EVIDENCE DERIVED FROM AN UNNECESSARILY AND IMPERMISSIBLY SUGGESTIVE PHOTOGRAPHIC SHOW-UP VIOLATED RESPONDENT'S RIGHT TO DUE PROCESS OF LAW.

Respondent Brathwaite was convicted at his Connecticut state court drug trial on the basis of identification testimony derived from a photographic identification procedure found by the court of appeals, and now conceded by petitioner in his brief to this Court,[4] to be unnecessarily and impermissibly suggestive. As the first ground for reversing respondent's conviction, the court of appeals, Friendly, J., held that such out-of-court identification evidence is subject to strict exclusion at trial, without regard to its reliability, and found its admission at respondent's trial to violate respondent's rights under the due process clause. The validity of this holding represents the principal issue presented for review by this Court.

In *Stovall* v. *Denno*, 388 U.S. 293 (1967), this Court first recognized that the constitutional right to a fair trial is jeopardized when identification evidence of questionable reliability derived from suggestive confrontation procedures is presented to the fact-finder and serves as the basis for conviction of a defendant. While *Stovall*, and subsequent cases, *Foster* v. *California*, 394 U.S. 440 (1969); *Neil* v. *Biggers*, 409 U.S. 188 (1972), have established that such evidence is subject to

[4] Brief of the Petitioner, p. 10.

exclusion at trial on due process grounds, the Court has not, to the present time, had occasion to formulate the scope of the exclusionary rule applicable to post-*Stovall*, out-of-court identification evidence.[5]

In the absence of clarification by this Court, lower courts have responded to *Stovall* with two distinct rules of exclusion for out-of-court identification evidence. *Compare Brathwaite* v. *Manson*, *supra*, and *Smith* v. *Coiner*, 473 F.2d 877 (4th Cir.), *cert. den.*, *Wallace* v. *Smith*, 414 U.S. 1115 (1973), with *United States ex rel. Kirby* v. *Sturges*, 510 F.2d 397 (7th Cir.), *cert. den.*, 421 U.S. 1016 (1975). These rules, while both attempting to insure the reliability of identification evidence admitted at trial, seek to attain that objective in different ways. *See* generally Pulaski, *Neil v. Biggers: The Supreme Court Dismantles the Wade Trilogy's Due Process Protection*, 26 STAN. L. REV. 1097, 1111-1114 (1974).

The first rule, the strict rule of exclusion proposed by the court of appeals in the instant case, focuses on the procedures employed to obtain an identification and requires exclusion at trial of out-of-court identification evidence, without regard to its reliability, whenever it has been obtained through unnecessarily

[5] In *Stovall*, the Court upheld the confrontation procedures employed and thus was not required to explicate the appropriate exclusionary rule. The instant case marks the first case in which the Court has agreed to review a due process challenge to post-*Stovall* out-of-court identification evidence. In *Foster* v. *California*, 394 U.S. 440 (1969), and *Neil* v. *Biggers*, 409 U.S. 188 (1972), the confrontations occurred prior to June 12, 1967, the day *Stovall* was announced. In *Kirby* v. *Illinois*, 406 U.S. 682 (1972), and *United States* v. *Ash*, 413 U.S. 300 (1973), the Court did not review the due process issue. In *Coleman* v. *Alabama*, 399 U.S. 1 (1970), and *Simmons* v. *United States*, 390 U.S. 377 (1968), out-of-court identification evidence was not admitted at trial.

suggestive confrontation procedures. The rule is designed to insure that evidence of uncertain reliability is not presented to the trier of fact and, equally important, is intended to deter the use in the future of improper identification procedures. *Id.*; *Brathwaite* v. *Manson, supra,* at 371; *Smith* v. *Coiner, supra,* at 882.

The second rule, a selective or "totality" rule, looks to the reliability of an identification derived from suggestive procedures, allowing admission of the confrontation evidence if, in spite of the suggestiveness, the out-of-court identification is likely to be reliable. The rule is premised on the assumption that judges are capable of measuring, with sufficient precision, the impact of suggestiveness on a resulting identification and determining, on a case-by-case basis, when suggestive procedures have in fact produced a mistaken identification. The rule is not designed to have a deterrent impact, but rather attempts to limit the cost imposed by a sanction that excludes evidence from the trier's consideration. *United States ex rel. Kirby* v. *Sturges, supra*, at 407-8.

After *Stovall*, and prior to 1972, courts generally held that strict exclusion of improperly obtained, post-*Stovall* confrontation evidence was constitutionally mandated for deterrent reasons. *See, e.g., United States* v. *Fernandez*, 456 F.2d 638, 641-42 (2d Cir. 1972); *Kimbrough* v. *Cox*, 444 F.2d 8 (4th Cir. 1971); *United States* v. *Fowler*, 439 F.2d 133 (9th Cir. 1971); *Mason* v. *United States*, 414 F.2d 1176 (D.C. Cir. 1969); *Russell* v. *United States*, 408 F.2d 1280, 1285 (D.C. Cir.), *cert. den.*, 395 U.S. 928 (1969). Noting *Stovall*'s focus on the justification for the suggestive hospital show-up upheld in that case, *Stovall, supra,* at 302, and drawing on the constitutional force given to the Court's concern with deterrence in *United States* v. *Wade*, 388 U.S. 218, 235 (1967), and *Gilbert* v. *California*, 388

U.S. 263, 272-4 (1967), lower courts concluded that out-of-court identification evidence derived from unnecessarily suggestive confrontation procedures was subject to strict exclusion at trial, without regard to its reliability. *Id. See Clemons* v. *United States*, 408 F.2d 1230, 1237 (D.C. Cir. 1968) (*en banc*), *cert. den.*, 394 U.S. 964 (1969).

In 1972, in *Neil* v. *Biggers*, 409 U.S. 188 (1972), the Court held that evidence of an unnecessarily suggestive confrontation conducted *prior to Stovall* was admissible at trial because the resulting out-of-court identification was, under the totality of the circumstances, reliable. *Id.*, at 199. The Court recognized the deterrent value of a strict rule of exclusion of such evidence, but declined to apply such a rule to a pre-*Stovall* confrontation, since prior to *Stovall*, law enforcement authorities had no way of knowing that suggestive practices were subject to constitutional scrutiny, and thus the rule's deterrent purpose could not be served. *Id.* This position was consistent with the Court's previous determination that *Wade* and *Gilbert* should not be applied retroactively, *Stovall, supra*, at 296-301, and was also in harmony with the Court's refusal to hold other deterrent exclusionary rules retroactive. *See Desist* v. *United States*, 394 U.S. 244 (1969); *Linkletter* v. *Walker*, 381 U.S. 618 (1965).

Neil left unstated the due process rule applicable to post-*Stovall* confrontations, recognizing that formulation of such a rule would require consideration of a deterrence factor and would not be constrained by the need, in *Neil*, for a narrow rule to limit interference with legitimate convictions involving improper pre-*Stovall* confrontation evidence. *See* Grano, *Kirby, Biggers, and Ash: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?* 72 MICH. L. REV. 717, 776-9 (1974). Although lower

courts have, after *Neil*, applied a "totality" test to post-*Stovall* confrontations, such courts have generally failed to take heed of *Neil*'s retrospective thrust and the intentionally limited nature of the rule adopted in *Neil*. *Compare Stanley* v. *Cox*, 486 F.2d 48 (4th Cir.), *cert. den.*, 416 U.S. 958 (1973), with *Smith* v. *Coiner, supra*. But *see United States ex rel. Kirby* v. *Sturges, supra*.

In the instant case, involving a post-*Stovall* confrontation, the Court of Appeals for the Second Circuit was presented with the issue left open in *Neil*. Writing for a unanimous panel, and relying heavily on the prior decisions of this Court, Judge Friendly concluded that a strict rule excluding all out-of-court identification evidence derived from unnecessarily suggestive confrontation procedures is constitutionally mandated to deter improper practices and insure that innocent defendants will not be wrongfully convicted of crimes they did not commit.

Respondent respectfully submits that the holding of the court of appeals is correct and should be affirmed by this Court.

1. A Strict Rule of Exclusion Is Constitutionally Mandated for Deterrent Purposes.

It has been noted that "[t]here is surprising unanimity among scholars in regarding [a strict rule of exclusion at trial of evidence derived from an unnecessarily suggestive confrontation] as essential to avoid serious risk of miscarriage of justice." *United States ex rel. Kirby* v. *Sturges, supra*, at 405-06. Legal commentators have vigorously urged adoption of such a rule,[6] and the American Law Institute has included a

[6] *See* Grano, *Kirby, Biggers, and Ash: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?* 72 MICH. L. REV. 717, 782-783 (1974); Pulaski, *Neil* *(continued)*

rule requiring strict exclusion in its Model Code of Pre-Arraignment Procedure.[7] Experienced federal judges, including the chief judges of two circuits, have also supported such a rule.[8]

The primary purpose of a strict exclusionary rule is deterrence of improper identification practices. This Court has consistently recognized that because suggestiveness is often so difficult to detect, and its impact so uncertain once detected, "the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the [confrontation] itself." *Wade, supra*, at 235. The preeminence of a deterrent factor is revealed not only

(footnote continued from preceding page)
v. *Biggers; The Supreme Court Dismantles the Wade Trilogy's Due Process Protection*, 26 STAN. L. REV. 1097, 1113 (1974); Sobel, *Assailing the Impermissible Suggestion: Evolving Limitations on the Abuse of Pretrial Criminal Identification Methods*, 38 BROOK. L. REV. 261, 291 (1971); *Recent Developments, Identification: Unnecessary Suggestiveness May Not Violate Due Process*, 73 COLUM. L. REV. 1168, 1180 (1973); Note, *Pretrial Identification Procedures–Wade to Gilbert to Stovall: Lower Courts Bobble the Ball*, 55 MINN. L. REV. 779, 794 (1971).

[7] Model Code of Pre-Arraignment Procedure, Sections 160.1, 160.2, 160.7(2) (Tent. Draft No. 6, 1974). *See* also Arizona State University College of Law, Model Rules for Law Enforcement: Eyewitness Identification (1972).

[8] Chief Judges Bazelon, in *Wright* v. *United States*, 404 F.2d 1256, 1262 (D.C. Cir. 1968) (Bazelon, C.J., dissenting), and Kaufman, in the instant case, are joined by Judge Winter of the Fourth Circuit, Smith v. Coiner, *supra*, Judge Wright of the District of Columbia Circuit, Clemons v. United States, *supra*, at 1250 (Wright, J., concurring in part and dissenting in part) and arguably Judge McGowan, speaking for the *en banc* District of Columbia Court in *Clemons, see* United States ex rel. Phipps v. Follette, 428 F.2d 912, 914 n.3 (2d Cir.), *cert. den.*, 400 U.S. 908 (1970), as well as Judge Friendly, the author of the panel opinion herein.

in *Gilbert*, where deterrence explictly mandated adoption of a strict exclusionary rule, but in *Stovall* and *Foster* v. *California*, *supra*, as well, where the Court resolved due process challenges to out-of-court identification evidence by examining the suggestiveness of and need for the confrontation procedures employed, rather than the reliability of the out-of-court identification.[9] Indeed, in *Foster*, the Court explicitly rejected an inquiry into reliability, noting that "it is the teaching of *Wade*, *Gilbert*, and *Stovall*, *supra*, that in some cases the procedures leading to an eyewitness identification may

[9]In *Stovall*, the Court looked solely to the justification for the show-up procedure employed, finding no due process violation because the suggestive hospital confrontation had been necessitated by legitimate fears that the victim's critical condition would prevent a subsequent, less suggestive confrontation. Significantly, the Court made no mention in *Stovall* of the substantial evidence, including the victim's considerable opportunity to observe her attacker, that made misidentification unlikely. *See* United States ex rel. Stovall v. Denno, 355 F.2d 731, 733-4, 758 (2d Cir. 1966) (*en banc*). Similarly, in *Foster* v. *California*, *supra*, the Court found the repeated use of suggestive confrontation procedures by law enforcement agents seeking to obtain a positive identification to present "a compelling example of unfair line-up procedures." *Id.*, at 442.

Although the Court did focus on reliability in *Simmons* v. *United States*, *supra*, and *Coleman* v. *Alabama*, *supra*, these cases involved due process challenges to *in-court* identification evidence, and thus, following the reasoning set forth in *Wade*, looked to the existence of an "independent basis" for the in-court identification. Because there was no attempt to exploit a possibly improper confrontation by presenting at trial evidence of an out-of-court identification, the deterrent rationale was not applicable to resolution of the due process claims raised in *Simmons* and *Coleman*.

be so defective as to make the identification constitutionally inadmissible as a matter of law." *Id.*, at 442-3 n.2.

The need for deterrence recognized in prior cases is still substantial, *see* Grano, 72 MICH. L. REV., *supra*, at 723-24, as the facts of this case well illustrate. The photographic identification procedure employed in the instant case was explicitly criticized by this Court in 1968 in *Simmons* v. *United States*, 390 U.S. 377, 383 (1968), and has met with strident condemnation in lower courts as well. *See, e.g., Kimbrough* v. *Cox*, 444 F.2d 8, 10 (4th Cir. 1971); *United States* v. *Kimbrough*, 528 F.2d 1242 (7th Cir. 1976). Nonetheless, the procedure continues to be needlessly employed, and courts have faced repeated challenges to identification evidence derived from photographic showups. *Id.; see* also *Workman* v. *Cardwell*, 471 F.2d 909 (6th Cir.), *cert. den.*, 412 U.S. 932 (1972); *United States* v. *Cook*, 464 F.2d 251 (8th Cir.), *cert. den.*, 409 U.S. 1011 (1972); *United States ex rel. John* v. *Casscles*, 489 F.2d 20 (2d Cir. 1973), *cert. den.*, 416 U.S. 959 (1974); *United States* v. *Reid*, 517 F.2d 953 (2d Cir. 1975). Indeed, as one witness testified at respondent's trial, identification through use of one photograph is not at all unusual in Connecticut [T. 71].

The legislative regulations the Court had hoped *Wade* would engender, *Wade*, *supra*, at 239, have not been forthcoming to any great extent.[10] Connecticut, for

[10]*See* Pulaski, 26 STAN. L. REV., *supra*, at 1102 n.36. Indeed, Congress responded to *Wade* with legislation designed to overrule the Court's holding. 18 U.S.C. §3502 (1970). *See* generally Read, *Lawyers at Line-ups: Constitutional Necessity or Avoidable Extravagance*, 17 U.C.L.A. L. REV. 339, 360-7 (1969).

example, has recently adopted a code of criminal procedure that omits any standards for identification proceedings. *See* Connecticut Practice Book, chapter 65, §§2000-2433 (adopted June 7, 1976, to take effect October 1, 1976).

A "totality" rule cannot logically be expected to have a significant deterrent impact on identification practices. *See* Model Code of Pre-Arraignment Procedure, Commentary on Article 160, p. 427 n.13. Since, under such a rule, an out-of-court identification can, if it is "reliable," survive even the most improper identification procedure, a police officer or prosecutor will often have little incentive to adopt fairer procedures. Equally important, in cases where external factors do validate an identification derived from unnecessarily suggestive procedures, a law enforcement agent may not even know that the procedure used was improper or understand the limited reason the identification evidence was allowed. *Cf.*, *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 417 (1971) (Burger, C.J., dissenting).

A strict rule of exclusion, on the other hand, will have a direct and immediate impact on law enforcement agents. Since the basis for exclusion is the conduct of the agents, the agents will know precisely when and why their conduct was improper. Moreover, since the rule is applicable only when the procedures employed were unjustified, the agent's conduct can and should be deterred. *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974).

It has been suggested that deterrence, by itself, is insufficient to warrant a constitutional rule excluding evidence obtained through unnecessarily suggestive

confrontation procedures, because no constitutional right is violated by a suggestive confrontation until evidence of it is introduced at trial. *United States ex rel. Kirby* v. *Sturges, supra*, at 406-07. *Stovall*, it is argued, protects only an "evidentiary interest" designed to insure a fair trial, and, unlike *Gilbert*, involves no underlying constitutional deprivation; since the right to a fair trial is violated only when unreliable evidence is admitted against an accused, and absent any independent constitutional infraction to be deterred, a strict deterrent rule, however desirable, is not constitutionally mandated. *Id.* But *see Michigan* v. *Tucker, supra*, at 445-6.

Although the *Gilbert* rule is triggered by a Sixth Amendment violation, it is the need to protect the Fifth and Fourteenth Amendment right to a fair trial against evidence that might otherwise make the trial proceeding a meaningless formality that underlies *Wade* and *Gilbert* and provides the basis for the exclusionary sanction adopted in *Gilbert*.[11] Indeed, Judge Leventhal,

[11]In *Wade*, the Court observed that a confrontation "is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial," *Wade, supra*, at 228, and later added that since a witness is unlikely to retreat from his initial out-of-court identification, "the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then before the trial." *Id.*, at 229. Indeed, it is clear that the basis for the extension of counsel in *Wade* and *Gilbert* to a pre-trial out-of-court proceeding was the Court's recognition that a post-indictment line-up is a "critical stage" of the proceedings, the results of which "might well settle the accused's fate and reduce the trial itself to a mere formality." *Id.*, at 224.

The Court's unwillingness in *Gilbert* to allow the prosecution to show that no prejudice resulted at the line-up stands in marked contrast to other right to counsel cases where inquiry into lack of prejudice was permitted, Coleman v. Alabama, 399 U.S. 1, 10-11 (1970); Hoffa v. United States, 385 U.S. 293, 308-9 (1966); and reveals the deeper Fifth Amendment interests being protected.

concurring in *Clemons* v. *United States*, *supra*, at 1250-52 (Leventhal, J., concurring), recognized *Stovall*'s "evidentiary interest" but nonetheless stated well the force of the fair trial right: "Identification testimony is a particularly important kind of evidence, so important as to occasion exclusionary rulings that are sweeping in prospective application." *Id.*, at 1251.[12]

The force of the constitutional interest in protecting the right to a fair trial is further underscored by the well-established rule that a coerced confession may not be admitted at trial, no matter how reliable it may be. *Rogers* v. *Richmond*, 365 U.S. 534, 540 (1961); *Lisenba* v. *California*, 314 U.S. 219, 235 (1941). As with evidence of a suggestive confrontation, exclusion of a coerced confession is premised on the constitutional violation that occurs when the confession is introduced at trial, rather than on the existence of a prior constitutional illegality in the procurement of the evidence. *Lisenba*, *supra*. As Justice Harlan pointed out, describing the basis of this rule, in his dissenting opinion in *Mapp* v. *Ohio*, 367 U.S. 643, 684-85 (1961) (Harlan, J., dissenting):

[12]According to Judge Wright, the majority in *Clemons* recognized that a strict rule of exclusion would be applicable to unnecessarily suggestive post-*Stovall* confrontations. Clemons, *supra*, at 1253 (Wright, J., concurring in part and dissenting in part); *accord*: United States ex rel. Phipps v. Follette, *supra*; *see* Clemons, *supra*, at 1237; Russell v. United States, 408 F.2d 1280, 1285 n.25 (D.C. Cir.), *cert. den.*, 395 U.S. 928 (1969). In light of Judge Leventhal's recognition of *Stovall*'s "evidentiary interest," it is significant that he "wholeheartedly" joined in the majority discussion of the post-*Stovall* rule. Clemons, *supra*, at 1250-1 n.1 (Leventhal, J., concurring).

> The pressures brought to bear against an accused leading to a confession, unlike an unconstitutional violation of privacy, do not, apart from the use of the confession at trial, necessarily involve independent Constitutional violations. What is crucial is that the trial defense to which an accused is entitled should not be rendered an empty formality.

Justice Harlan characterized the rule as "a procedural right," violated only at trial when a coerced statement is admitted against a defendant. *Id.*, at 685.

It is the need to insure the fairness of the trial that underlies the deterrent exclusionary rule of *Gilbert*, in much the same way that it underlies the exclusionary rule of *Rogers* and *Lisenba*. Since the fairness of the trial is threatened equally, if not more so,[13] by suggestive confrontation evidence, a rule excluding evidence of unnecessarily suggestive confrontations has an established constitutional predicate.[14]

[13]Indeed, the likelihood of a fair trial in the face of such evidence is even more gravely threatened than in *Gilbert*, since although a line-up may be fairly conducted without counsel present, a suggestive confrontation is *a priori* unfair.

[14]A related constitutional basis for a strict deterrent rule, also drawn from the Fifth and Fourteenth Amendment right to a fair trial, is found in the Court's recognition that a prosecutor has a constitutional "...duty to refrain from improper methods calculated to produce a wrongful conviction." Berger v. United States, 295 U.S. 78, 88 (1935). When a prosecutor knowingly manipulates or misrepresents evidence to secure a conviction, the fundamental fairness of a trial is called into question, and a resulting conviction must be set aside. Miller v. Pate, 386 U.S. 1, 7 (1967); Napue v. Illinois, 360 U.S. 264, 269 (1959); Alcorta v. Texas, 355 U.S. 28, 31 (1957).

In *Brady* v. *Maryland*, 373 U.S. 83 (1963), the Court made clear that prosecutorial mismanagement of evidence prior to

(continued)

It is important to recognize that this Court has already determined that an exclusionary rule is constitutionally required for suggestively obtained out-of-court identification evidence. *Foster* v. *California, supra.* The issue before the Court is only the proper scope of that rule, and, more specifically, the input into the rule of a deterrence factor. Whether or not *Stovall's* "evidentiary interest" can, by itself, sustain a constitutional deterrent rule, recent decisions of this Court make clear that as a prophylactic rule designed to safeguard the Fifth and Fourteenth Amendment right to a fair trial, a deterrent rule can be warranted. *Michigan* v. *Tucker, supra,* at 445-446, 450 (1974); *United States* v. *Calandra,* 414 U.S. 338, 347-52 (1974). These decisions indicate that deterrence may properly justify an exclusionary rule, if, balancing the

(footnote continued from preceding page)
commencement of trial may also violate a defendant's right to a fair trial. Only last term, the Court reaffirmed the constitutional dimension of the prosecutor's obligations in this respect. United States v. Agurs, ___ U.S. ___, 96 S. Ct. 2392, 2399 (1976).

The use of unnecessarily suggestive identification procedures involves a manipulation of evidence very similar to that condemned in prior cases. Suggestive procedures may often produce an identification where one would not otherwise have been forthcoming, Foster v. California, *supra,* or give added certainty to an identification in a doubtful case. *See* Williams and Hammelmann, *Identification Parades, Part I,* (1963) CRIM. L. REV. 479, 482. The consequence of unnecessary use of suggestive procedures may thus well be the manufacture of identification evidence or the manipulation of existing identification evidence into more positive and compelling testimony. To protect the integrity of the trial process, it is therefore constitutionally necessary that evidence willfully or negligently obtained through suggestive identification procedures by a prosecutor be excluded at trial. Palmer v. Peyton, 359 F.2d 199, 202 (4th Cir. 1969).

interests involved, the benefits of the rule outweigh its costs. *Michigan* v. *Tucker, supra,* at 445-46, 450.[15]

In assessing the deterrent value of a strict rule excluding all unnecessarily suggestive confrontation evidence, it is significant that several aspects of the rule indicate it is likely to have considerable practical effect. The rule focuses solely on the conduct of law enforcement officers, and unlike a "totality" rule, which involves external considerations, will provide clear guidelines concerning what procedures are and are not permissible. *See* Grano, 72 MICH. L. REV., *supra,* at 780. The rule admits of simple application and will facilitate judicial review at the trial and appellate levels of challenges to identification testimony.[16] Most important, the rule is aimed at conduct that can be deterred. Unlike the Fourth Amendment exclusionary rule, which, as presently applied, often carries in its sweep good faith or unintentional Fourth Amendment violations, the rule here focuses solely on *unnecessary* police procedures, procedures that are willful or negligent and can and should be prevented. "In such cases, the deterrent value of the rule is most likely to be effective, and the corresponding mandate to preserve

[15]In Michigan v. Tucker, *supra,* at 445-46, the Court employed such an analysis to determine whether an exclusionary rule to deter police conduct that violated the prophylactic *Miranda* standards, *but not the Constitution itself,* was warranted.

[16]While the "totality" rule can easily require a minitrial to determine the reliability of an out-of-court identification, the strict rule will narrow the focus to the procedures employed and the justifications, if any, for the suggestiveness. At the appellate level, review will also be less complex and not require scrutiny of the entire trial transcript.

judicial integrity . . . most clearly demands that the fruit of official misconduct be denied." *Brown* v. *Illinois*, 422 U.S. 590, 611 (1975) (Powell, J., concurring).

A strict exclusionary rule will also minimize, if not eliminate the immediate risk that unreliable confrontation evidence derived from suggestive procedures will be presented to the jury. Since a totality test necessarily involves inquiry into the uncertain areas of individual personality, perception, memory and suggestibility, *see* Levine and Tapp, *The Psychology of Criminal Identification: The Gap From Wade to Kirby*, 121 U. PA. L. REV. 1079, 1087-1131 (1973), it is possible, if not probable, that error will occur, from time to time, in its application. *See* Argument, A-2, *infra*. A strict rule, which excludes all suggestively obtained identification evidence, avoids such error.

A strict rule will, thus, deter improper confrontation procedures, facilitate judicial disposition of due process claims to confrontation evidence, insure that unreliable evidence is not presented to the fact-finder, and uphold the integrity of the judicial system. Counterbalanced against these benefits is the possible interference with the effective prosecution of guilty defendants engendered by a rule that excludes reliable, as well as unreliable, evidence from the trier's consideration. While it is true that a strict rule may, on occasion, require exclusion of reliable confrontation evidence, it is not true that the ultimate harm, acquittal of guilty defendants, will necessarily result.

Presentation to a fact-finder of an out-of-court identification is, of course, not a prerequisite to every conviction, nor will the admission of such evidence

necessarily promote conviction.[17] But even in cases where the admission of out-of-court identification evidence may affect the outcome of a trial, application of a strict rule of exclusion need not significantly burden a prosecution.

Unlike the suppression of illegally seized evidence, which may, in the extreme, terminate a prosecution and, will, at the very least, deprive a prosecution of

---

[17]In many cases, suggestive confrontation evidence will not have an affirmative impact on the fact-finder's determination of guilt. The probative value of such evidence is often quite low: even when an out-of-court identification is reliable, the suggestive procedures used to obtain it will vitiate its weight at trial. As one commentator has pointed out, juries are apt to discount suggestive confrontation evidence and may acquit a guilty defendant because doubtful procedures undermine a valid identification. McGowan, *Constitutional Interpretation and Criminal Identification*, 12 WM. & MARY L. REV. 235, 241 (1970). Indeed, often a prosecutor will not offer evidence of a suggestive confrontation, lest an otherwise strong case be weakened. Sobel, *Assailing the Impermissible Suggestion: Evolving Limitations on the Abuse of Pretrial Criminal Identification Methods*, 38 BROOK. L. REV. 261, 269 (1971).

In those cases where the probative weight of the confrontation is high because the witness has identified an individual previously known to him, *see* Wade, *supra*, at 1171 (White, J., dissenting), the need for the out-of-court identification to sustain conviction is low. In such cases, it is the relationship between the witness and the accused that provides the compelling identification evidence; the identification itself takes place at the time of the original identification of the event in question and is merely confirmed at the confrontation. If the factfinder accepts the evidence of the prior relationship between the witness and the accused, evidence of the confrontation is unnecessary. In addition, independent evidence of guilt may be so strong that exclusion of a reliable out-of-court identification of high probative weight will have no bearing on the outcome of the trial.

probative evidence, a prosecution is not necessarily deprived of evidence when a reliable out-of-court identification is excluded at trial. Identification evidence need not be limited to the results of one particular confrontation; unlike physical evidence, which once suppressed cannot be replaced, identification evidence can be effectively duplicated both in and out-of-court with no significant dimunition in probative weight.

As *Wade* and *Simmons* make clear, even if an out-of-court identification is excluded, a prosecutor may still introduce at trial an in-court identification, as long as the in-court identification stems from a source independent of and untainted by the suggestive out-of-court confrontation. More importantly, a prosecutor is free to replace the excluded out-of-court identification evidence with other equally probative out-of-court identification evidence. A prosecutor may conduct any number of confrontations, physical or photographic, prior to or during trial.[18] Just as the existence of an "independent basis" will permit a witness to make an in-court identification after exclusion of a suggestive confrontation, so such an independent basis will permit the admission at trial of out-of-court identification evidence obtained at fairly conducted confrontations held subsequent to the original suggestive confrontation. Since the totality test and the independent basis test rely on the same factors, *compare Neil, supra,* at 199, with *Wade, supra,* at 241,

[18]Indeed, it is not unusual for a prosecutor to conduct a photographic confrontation prior to trial to determine a witness' ability to make an in-court identification. *See* United States v. Ash, 413 U.S. 300, 303 (1973).

if the original confrontation was "reliable" and therefore admissible under a "totality" test, an independent basis for a subsequent in or out-of-court identification will always exist.

Although there would necessarily be a passage of time between the original suggestive confrontation and any subsequent confrontations, this interval would not significantly undermine the impact of the identification evidence. While it may be that identification evidence has more weight with a jury when the identification is made close in time to the event witnessed, *cf.*, *Russell* v. *United States,* 408 F.2d 1280 (D.C. Cir. 1968), *cert. den.*, 395 U.S. 928 (1969),[19] if the subsequent confrontation is conducted reasonably near in time to the original confrontation, it is likely that the presumed detrimental impact of the passage of time would be equalled, if not outweighed by the positive impact resulting from the fairness of the procedures at the subsequent confrontation. *See* McGowan, *Constitutional Interpretation and Criminal Identification,* 12 WM. & MARY L. REV. 235, 241 (1970). Furthermore, prompt prosecutorial review of identification procedures in a particular case will forestall a significant interval between the first and second confrontation. Thus, not only can excluded out-of-court identification evidence be replaced, it can be replaced with no significant cost to a prosecution.

[19]On-the-scene show-up identifications, even though suggestively obtained, would not be excluded under a strict rule, since such identifications have been held to be justified by the inherent reliability of a proceeding conducted when recollection is especially fresh. Russell v. United States, *supra,* at 1284.

A strict rule of exclusion of identification evidence is thus quite different in impact than a rule excluding illegally seized tangible evidence. The probative force of excluded physical evidence cannot be replaced and is often critical to a prosecution; the reliability of such evidence is unquestioned; and its acceptance by the fact-finder is in little doubt. An identification procured by means of suggestive procedures is of uncertain reliability, may well be discounted by the jury, and most important, can be easily replaced with little cost to the prosecution by the results of subsequent in and out-of-court confrontations.

A strict rule of exclusion of improperly obtained confrontation evidence does not impose a significant cost on the trial process. Since, on the other hand, it provides substantial benefits, it is constitutionally mandated to implement the Fifth and Fourteenth Amendment right to a fair trial. *Michigan* v. *Tucker*, *supra*; *Gilbert* v. *California*, *supra*.

2. A Strict Rule is Constitutionally Mandated to Insure Effective Identification and Exclusion of Unreliable Confrontation Evidence.

Although support for a strict rule generally centers on its deterrent value, a more fundamental rationale compels its adoption. The immediate purpose of a rule, strict or selective, excluding identification evidence derived from suggestive procedures is the exclusion at trial of unreliable identification evidence and the consequent prevention of unjust convictions. A constitutionally adequate rule must therefore guarantee *effective* identification and exclusion of such unreliable

evidence. The "totality" rule fails to fulfill this constitutional function.

The accuracy of an inquiry into the reliability of an identification derived from suggestive procedures has been the subject of substantial legal and psychological challenge, since the "totality" rule was announced in *Neil* four years ago. *See* Grano, 72 MICH. L. REV., *supra*, at 724, 735-37, 749; Pulaski; 26 STAN. L. REV., *supra* at 1097-98; Levine and Tapp, *The Psychology of Criminal Identification: The Gap From Wade to Kirby*, 121 U. PA. L. REV. 1079, 1087-1131 (1973); *cf.*, *United States* v. *Wade*, 388 U.S. 218, 247-248 (1967) (Black, J., concurring and dissenting). The rule's underlying premise, that judges are capable of assessing the impact on a witness of suggestive procedures, has been sharply disputed by psychologists who contend that in the majority of cases the impact of suggestiveness is dependent on unknown individual personality factors which cannot be quantified by trained psychologists, much less judges. *Id.*; *see* also Doob and Kirshenbaum, *Bias in Police Lineups--Partial Remembering*, 1 J. POLICE SCI. & ADMIN. 287 (1973); Stern, 34 J. AB. NORM. & SOC. PSYCH. 3 (1939). Legal commentators have further argued that too often independent evidence of guilt or innocence is relied upon by judges to find an identification reliable. *See*, *e.g.*, Grano, 72 MICH. L. REV., *supra*, at 780.

The "totality" test assumes that identification evidence derived from suggestive procedures is subject to easy location on a continuum, which starts at the point where suggestiveness has no influence on an identification and ends at the point where suggestiveness, not recollection, produces the identification. In fact, such is clearly not the case. In cases where the

witness knows the suspect prior to the crime, and thus is being asked merely to confirm the identification of a known suspect, rather than establish the identity of an unknown suspect, suggestiveness plays no part. In all other cases, where the identity of the suspect is unknown, suggestiveness is always a factor of uncertain significance.

Indeed, the imprecise nature of a "totality" inquiry into reliability is underscored by the repeated instances of judicial disagreement over the proper application of the test to a particular fact situation. *See, e.g., Brathwaite* v. *Manson, supra; United States ex rel. Cannon* v. *Smith,* 527 F.2d 702 (2d Cir. 1975); *Smith* v. *Coiner, supra; Rudd* v. *Florida,* 477 F.2d 805 (5th Cir. 1973); *United States* v. *Russell,* 532 F.2d 1063 (6th Cir. 1976); *Holland* v. *Perini,* 512 F.2d 99 (6th Cir.), *cert. den.,* 423 U.S. 934 (1975); *United States* v. *Bowie,* 515 F.2d 3 (7th Cir. 1975); *Sanchell* v. *Parratt,* 530 F.2d 286 (8th Cir. 1976); *United States* v. *Dailey,* 524 F.2d 911 (8th Cir. 1975); *Thomas* v. *Leeke,* 393 F. Supp 282 (D.S.C. 1975); *Dixon* v. *Hopper,* 407 F. Supp 58 (M.D.Ga. 1976). The social cost of even one mistaken determination can be substantial; the costs of the continued use of an unworkable test are staggering.

A strict rule excluding all evidence derived from suggestive confrontation procedures does not require such uncertain inquiry into the psychological factors that produce an identification. A strict rule will thus minimize, if not eliminate, the risk that unreliable evidence will be presented to the jury and will serve as the basis for a conviction.

This criticism of the "totality" rule does not imply that *Neil,* which adopted such a rule, was wrongly decided. In *Neil,* the Court intentionally framed a

narrow rule designed to limit interference with convictions based on identification evidence obtained prior to *Stovall.* The need to reach all improper convictions was therefore tempered by the Court's understandable reluctance to adopt a rule that would result in substantial disruption of possibly legitimate convictions.[20] The *Neil* rule is thus analagous in scope to a "harmless error" determination, the relevant inquiry not whether a mistake was made but whether the mistake had a likely impact on the outcome of the trial. For cases involving post-*Stovall* confrontation evidence, the need for a narrow rule disappears, and a rule that maximizes exclusion of all potentially unreliable identification evidence derived from suggestive procedures is constitutionally mandated.

A strict rule of exclusion of out-of-court identification evidence derived from unnecessarily suggestive confrontation procedures is constitutionally mandated to deter the future use of improper procedures and minimize the admission at trial of unreliable identification evidence. In this case, involving a post-*Stovall* confrontation, the Second Circuit Court of Appeals correctly applied such a rule, and its holding should be affirmed.

---

[20]The Court also recognized the difficulty a prosecutor might have in demonstrating the fairness of a pre-*Stovall* confrontation, since the trial record would not have been developed with *Stovall's* considerations in mind and supporting testimony might be unavailable years later. Neil *supra,* at 200.

B. THE COURT OF APPEALS DID NOT EXCEED THE PROPER SCOPE OF APPELLATE REVIEW IN HOLDING THAT THE PHOTOGRAPHIC IDENTIFICATION PROCEDURE USED TO OBTAIN AN IDENTIFICATION OF RESPONDENT CREATED A SUBSTANTIAL LIKELIHOOD OF MISIDENTIFICATION.

As an independent basis for reversing the district court and ordering the writ to issue, the court of appeals held that the photographic identification procedure employed to obtain Glover's identification testimony was so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. Although, in reaching this alternative holding, the court of appeals straightforwardly applied the *Neil* "totality" test, petitioner contends that the court of appeals exceeded the proper scope of its appellate review and improperly substituted its appraisal of the facts for that of the state trier of fact and federal district court judge. Petitioner's claim is premised upon the erroneous assumption that the issues involved in this case center around factual determinations as opposed to legal conclusions.

Respondent's habeas corpus petition sought relief on the ground that the admission at his state trial of identification testimony derived from an unnecessarily suggestive identification procedure had violated his due process rights. This was a legal question to be determined by the reviewing judge, after careful analysis of the facts. Thus, the federal district court judge considered the transcript of the state court trial and, applying the "totality" test of *Neil* v. *Biggers*, 409 U.S. 188, 199 (1972), held that although the procedures

used to obtain the identification evidence were unnecessarily and impermissibly suggestive, no substantial likelihood of misidentification had occurred. The court of appeals considered the same trial transcript in reaching the opposite conclusion.

"The dispute between the parties [was] not so much over the elemental facts as over the constitutional significance to be attached to them." *Neil, supra,* at 193 n. 3. Indeed, although the court of appeals disagreed with the district court's legal conclusion, it did not reverse a single finding of fact by the district court.

That the appellate court reached a different conclusion than the district court does not invalidate its decision. The appellate court was not bound, as petitioner suggests, by the legal interpretation given to the facts by the district court. *United States ex rel. Davis* v. *Johnson,* 495 F.2d 335 (3d Cir.), *cert. den.*, 419 U.S. 818 (1974). There was no evidentiary hearing held in the lower court, and so the district court judge was in no better position to assess the credibility or demeanor of witnesses than was the appellate court. Since the court of appeals' reasoning was based upon the same state trial transcript as was the district court's, the court of appeals was not required to give deference to the lower court's findings. *Wade* v. *Wainwright,* 450 F.2d 409 (5th Cir. 1971).

If the issue presented by this case were whether the evidence at trial was legally sufficient to sustain respondent's conviction, petitioner's argument might have some merit. Under such circumstances, assuming habeas corpus jurisdiction, the reviewing district court and the court of appeals would have both been enjoined to evaluate the evidence in the light most

favorable to the state, giving proper regard to the state jury's right to decide disputed questions of fact. The issue here is not, however, one of sufficiency of evidence. Respondent's claims called for a legal analysis of whether the photographic identification was suggestive, and, if so, whether such a procedure created a substantial likelihood of misidentification. As the *Wade* trilogy made clear, such a determination is, in the first instance, solely a question of legal admissibility for the court.

Nor is there any doubt that, in exercising its proper review, the court of appeals correctly applied the test set forth in *Neil* v. *Biggers, supra,* at 199, in concluding that the suggestiveness of the unnecessary photographic show-up employed by the police in this case created a substantial likelihood of misidentification. If the test set forth in *Neil* is to be the test even for post-*Stovall* confrontations, and if the test is to have any significance, this Court must agree that the facts of this case compel affirmance of Judge Friendly's opinion.

At respondent's trial, the only issue was the identity of the person who sold the drugs. This issue was determined solely[21] on the basis of identification

[21]There was no evidence, other than Glover's identification testimony, that implicated respondent in the sale. The testimony of the state's other witnesses undermined Glover's credibility. Brown, the state's undercover informant, who was described as "trustworthy" by Glover [T. 47], testified the transaction was conducted with a woman, not a man. Gaffey testified that he had instructed Glover to go to the apartment on the left side of the hallway, while Glover admitted that he bought drugs from someone in the apartment on the right. There were no fingerprints, admissions or confessions relating to respondent, nor was there any allegation that respondent was a known drug user or dealer. *(continued)*

evidence derived from a photographic procedure that has been condemned as "the most suggestive and therefore the most objectionable method of pre-trial identification." *Kimbrough* v. *Cox,* 444 F.2d 8, 10 (4th Cir. 1971),[22] and which petitioner concedes was unjustified in the circumstances of this case.

This Court has specifically warned of the dangers inherent in identification proceedings involving one photograph:

> Even if the police subsequently follow the most correct photographic procedures and show [a witness] the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw. . .
>
> *Simmons* v. *United States, supra,* at 383.

(footnote continued from preceding page)

Respondent himself denied commiting the crime and gave an explanation of his whereabouts on the day of the crime which was supported by several witnesses and not contradicted by a single rebuttal witness for the state. Respondent's character was never impeached during his testimony, since his only prior criminal involvement was a minor breach of the peace charge.

[22]Other circuits have similarly condemned photographic show-ups. *See, e.g.,* United States ex rel. Gonzalez v. Zelker, 477 F.2d 797 (2d Cir. 1973), *cert. den.*, 414 U.S. 924 (1974); Workman v. Cardwell, 471 F.2d 909 (6th Cir. 1972), *cert. den,* 412 U.S. 932 (1973); United States v. Kimbrough, 528 F.2d 1242 (7th Cir. 1976); United States v. Cook, 464 F.2d 251 (8th Cir.), *cert. den.*, 409 U.S. 1011 (1972); United States v. Fowler, 439 F.2d 133 (9th Cir. 1971); Mason v. United States, 414 F.2d 1176 (D.C. Cir. 1969).

D'Onofrio's use of this procedure was, as petitioner admits, wholly unnecessary. Although two days elapsed between the sale and the confrontation, there was no attempt made by D'Onofrio or any other officer to construct a proper photographic display or line-up. Since Glover was readily accessible to D'Onofrio, and since D'Onofrio claimed to have known the whereabouts of Brathwaite [T. 70], no emergency compelled rejection of these fairer and more reliable alternatives.

Nor does the fact that Glover was a police officer, and presumably a trained observer, excuse the suggestive procedure. *Neil* certainly did not intend to exempt from scrutiny identifications made by police officers. This was not a case where undercover investigation had produced a long-standing relationship between Glover and respondent or where Glover's identification was merely a confirmation of the identity of a person previously known to him. To the contrary, the seller had not been under prior surveillance, and neither Glover nor D'Onofrio knew the identity of the seller at the time of the sale. Furthermore, Glover was not a victim, *see United States* v. *Reid*, 517 F.2d 953 (2d Cir. 1975), or an uninvolved bystander, but rather "an undercover agent whose business was to cause arrests to be made." *Brathwaite* v. *Manson*, *supra*, at 371. As the court of appeals properly observed, Glover's possible incentive to make an identification cannot be lightly dismissed.[23]

[23]Glover had expended police department money for the purchase of drugs, and an identification and arrest were expected as a result.

When D'Onofrio placed respondent's picture at the police station for Glover to identify, Glover knew that respondent was the prime, if not only, suspect in the case, as well as D'Onofrio's personal choice as the seller. The impact of this suggestiveness on Glover's subsequent identification cannot be ignored,[24] *see United States ex rel. Kirby* v. *Sturges*, *supra*, at 403, and it was all but inevitable that Glover would identify respondent "whether or not he was in fact 'the man.'" *Foster* v. *California*, *supra*, at 443.

Because the impact of the suggestiveness can never be precisely measured, every identification resulting from a photographic show-up must be examined warily and admitted at trial only if there are no factors pointing toward a likelihood of misidentification. Not only was the identification procedure employed in this case highly suggestive and totally unnecessary, but numerous other factors point toward a very substantial likelihood of misidentification.

Glover had an extremely limited opportunity under poor lighting conditions to view the seller at the time of the transaction. Glover saw the subject on two very brief occasions behind a door that was opened only twelve to eighteen inches [T. 29]. There was no

[24]Although *Neil* does not include the suggestiveness of the procedure as a separate element in its five factor test, it must be emphasized at the outset that such suggestiveness plays an important role in the determination of whether an identification is reliable. *See* Clemons, *supra*, at 1245 n. 16. Several courts have even indicated that a photographic show-up is so suggestive that it will always give rise to a substantial likelihood of misidentification, warranting per se exclusion of all photographic show-up evidence. United States v. Fowler, *supra*; United States v. Workman, 470 F.2d 151 (4th Cir. 1972).

artificial light in the hallway where Glover was standing [T. 28], nor was there any light coming from inside the apartment to help illuminate the scene [T. 33]. The natural light in the hallway was limited since the sun was setting at the time of the alleged sale [*Brathwaite* v. *Manson, supra,* at 371].

Most importantly, Glover did not look at the seller for "two to three minutes," as petitioner suggests, but, as the trial record indicates, only long enough for three short sentences to be spoken [T. 30, 31] and for the exchange to occur [T. 32]. Glover and Brown arrived outside the apartment building at 7:45 p.m. [T. 10]. At 7:53 p.m. they had returned to their automobile [T. 11], having been inside the building for a total of "three to four minutes [T. 60]." Since Glover testified at least three of these minutes were consumed by waiting in front of a closed door for the seller to reappear with the drugs [T. 31], and since some of this time must also have been spent climbing up and down three flights of stairs, it is evident that at most, Glover had a brief glimpse of the alleged seller.

Moreover, during this brief encounter, Glover's attention was not directed solely upon the seller. When the door first opened, he was confronted with two persons, not just one [T. 31], and, during the second short viewing, Glover was necessarily forced to concentrate on the transfer of drugs [T 32].

Glover's description of the seller was not so detailed as to distinguish this person from countless other black males in the Hartford area. Glover described the seller as "a colored man, approximately five feet eleven inches tall, dark complexion, black hair, short Afro style, and having high cheekbones, and of a heavy build. He was wearing at the time blue pants and a

plaid shirt [T. 36-37]." Absent is any indication of the approximate age of the seller or any other distinctive identifying characteristics he may have had. Although Brathwaite was suffering from a facial tic on May 5, 1970 [T. 139], and although he was a native of Barbados in the British West Indies [T. 99], there was no mention by Glover that the seller had any unusual physical ailments or any foreign characteristics.

The weight to be given the apparent certainty of Glover's identification of Brathwaite at trial is negligible. When Glover identified Brathwaite during the trial, Brathwaite was the only black male sitting at the defense table, and thus identification was inevitable. The certainty of Glover's in-court identification was further undermined by petitioner's admission at oral argument before the court of appeals that prior to commencement of the trial, Glover again viewed the single photograph of Brathwaite. During the eight months between the transaction and the trial, Glover most probably made dozens of identifications and arrests. The probability that he would have remembered this seller so positively, absent the first and second viewing of Brathwaite's photograph and absent any viewing of the seller prior to or subsequent to the incident, is remote.

The length of time between the crime and confrontation also militates against the reliability of Glover's out-of-court identification. For no apparent reason D'Onofrio waited two days before conducting the photographic show-up. Had Glover made the identification the same night as the transaction, his

recollection of the seller would have been more acute,[25] and the impact of the suggestive show-up might have been less significant. After forty-eight hours, however, Glover's identification of Brathwaite from a single photograph is of tenuous value.[26]

Taken together, these are the factors which Judge Friendly carefully evaluated in determining that the risk of mistaken identification in this case was too unacceptably high to permit the conviction to stand. Far from substituting its judgment for that of the state trier of fact or reversing findings of fact made by the district court, the court of appeals reviewed the same record that was before the district court and reached a different conclusion on a question that was plainly within the proper scope of its appellate review.

[25] Although a show-up conducted within minutes after a crime has been committed has generally been upheld, Russell v. United States, *supra*; Stewart v. United States, 418 F.2d 1110 (D.C. Cir. 1969), it is clear that a two day delay between observation and confrontation falls outside the rationale of such cases, since recollection is no longer fresh, nor the need for a "prompt" identification applicable. *See* McCrae v. United States, 420 F.2d 1283, 1290 (D.C. Cir. 1969), where a show-up held four hours after the crime was invalidated because the "nexus of time and place between offense and identification had become too attenuated to outweigh the admitted dangers of presenting suspects singly to witnesses."

[26] At trial, Glover also made an in-court identification of respondent as the seller [T. 33]. Admission of this evidence was also constitutional error, since, for the reasons discussed with respect to the reliability of the out-of-court identification, no independent basis for the in-court identification can be found. *Compare Neil, supra,* at 199, with *Wade, supra,* at 241. Furthermore, *Neil* makes clear that admission of the out-of-court identification, if error, would require reversal of respondent's conviction. *Neil, supra,* at 198 n. 5.

The court of appeals' holding was correct and should be affirmed by this Court.

CONCLUSION

WHEREFORE, for the foregoing reasons, respondent prays that the judgment of the court below be affirmed.

Respectfully submitted,

DAVID S. GOLUB
733 Summer Street
Stamford, Connecticut 06905

MARTHA STONE
412 Fifth Street, N.W.
Washington, D.C. 20001

Attorneys for Respondent

Of Counsel:

FREDERICK H. WEISBERG
Public Defender Service
601 Indiana Avenue, N.W.
Washington, D.C. 20004

RICHARD A. SILVER
JAY H. SANDAK
733 Summer Street
Stamford, Connecticut 06905